not necessary to make the change eligible for minor permit revision procedures and do not change the applicant's proposed determination of which requirements of the Act apply to the source as a result of the requested change and if the source demonstrates to the satisfaction of the permitting authority its compliance with the applicable requirement to which it is subject as a result of the change and the source's proposed permit revision. However, the source would remain liable for any violations of the requirements of the Act applicable as a result of the change and the source's proposed permit revision. **((ADD NEW SENTENCE: If, after the permitting authority's final action to revise the permit, any verification testing of the new operating level or revised monitoring approach as required by paragraph (g)(2)(vi) of this section demonstrates that the new operating level or revised monitoring approach fails to demonstrate compliance, the source then shall comply with the monitoring and recordkeeping permit terms and conditions that applied to the source before the minor permit revision, the minor permit revision shall be null and void and cease to have effect, and the source shall be liable for operating in violation of its permit from the time it implemented the change.))**

(10)~~(8)~~ Permit shield. The permit shield under § 71.6(n)~~70.6(f)~~ of this part may extend to minor permit revisions, provided that the permitting authority has taken

final action to issue the minor permit revision as a permit revision.

(h) Significant permit revision procedures.

(1) Criteria. Significant permit revision procedures shall be used for applications requesting permit revisions that do not qualify as administrative amendments, de minimis permit revisions, or minor permit revisions. ~~The State program shall contain criteria for determining whether a change is significant.~~ At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered a significant change~~significant~~. **((DELETE PRECEDING SENTENCE))** Nothing herein shall be construed to preclude the permittee from making changes consistent with this part that would render existing permit compliance terms and conditions irrelevant.

(2) Significant~~The State program shall provide that significant~~ permit revisions shall meet all requirements of this part, including those for applications, public participation, review by affected States, and in the case of a program delegated pursuant to § 71.10 of this part, review by EPA, as they apply to permit issuance and permit renewal. The permitting authority shall ~~design and~~ implement this review process to complete review on the majority of significant permit revisions within 9 months after receipt of a complete application.

((ADD NEW PARAGRAPH: (3) Changes involving new or alternative monitoring methods that have not been approved pursuant to major or minor NSR under criteria equivalent to those contained in this paragraph shall be processed as significant permit revisions. Permitting authorities may approve such changes only where the new or alternative monitoring or recordkeeping method is demonstrated to have a known relationship and ability to determine compliance with the applicable standard. Such demonstration shall include an analysis conducted in accordance with 40 CFR 64.4(b)(5) and 64.4(e) utilizing appendices A, B, C, and D, and related appendices' procedures of 40 CFR part 64. The permitting authority shall include the demonstration and written evidence of the permitting authority's evaluation of the demonstration in the proposed permit it sends to EPA (in the case of a program delegated pursuant to § 71.10 of this part) for review as required by § 71.10 of this part.))~~for review as required by § 70.8.))~~

(i) Reopening for cause.

(1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(i) Additional applicable requirements under the Act become applicable to a major part 70 or part 71 source with a remaining permit term of 3 or more years. Such a

reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions have been extended pursuant to § 71.6 of this part or paragraph (c)(3) of this section~~§§ 70.4(b)(10)(i) or (ii)~~

(ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. Upon approval by the Administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(iii) The permitting authority or EPA (in the case of a program delegated pursuant to § 71.10 of this part) determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The permitting authority or EPA (in the case of a program delegated pursuant to § 71.10 of this part)~~Administrator or the permitting authority~~ determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance~~issuance,~~ and shall affect only those parts of the

permit for which cause to reopen exists, and shall be made as expeditiously as practicable. **Notwithstanding the** preceding sentence, proceedings to reopen for section 112 standards may use the following procedures:

(i) Where the section 112 standard is promulgated after permit issuance, administrative amendment procedures under paragraph (e)(5) of this section~~s 70.7(e)(5)~~ may be used.

(ii) Where the section 112 standard is promulgated before permit issuance and a compliance statement required under the section 112 standard is due after permit issuance, the source shall apply for a minor permit revision by the compliance statement deadline to incorporate requirements necessary to assure compliance with the standard, unless the source is exempted from this requirement under paragraph (i)(2)(iii)~~(iii)~~ of this section or under the rulemaking promulgating the section 112 standard. If the source is utilizing alternatives requiring case-by-case approval, such as emissions averaging, or if required under the rulemaking promulgating the section 112 standard, the source shall apply for a significant permit revision by the compliance statement deadline, in lieu of the requirement in the preceding sentence to apply for a minor permit revision.

(iii) Sources subject to the following section 112 standards promulgated as of [DATE OF PUBLICATION] are exempt from the requirements in paragraph (i)(2)(ii) of this

section~~(ii)~~ to apply for a minor permit revision: NESHAP for Industrial Process Cooling Towers.

(3) Reopenings under paragraph (i)(1) of this section shall not be initiated before a notice of such intent is provided to the part 70 or part 71 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened, except that the permitting authority may provide a shorter time period in the case of an emergency. Where reopening for section 112 standards requiring initial notification by the source, and where the source has provided such notification to the permitting authority by the applicable date, the permitting authority need not provide the notice required by the preceding sentence.

(j) Reopenings for cause by EPA for delegated programs.

(1) In the case of a program delegated pursuant to § 71.10 of this part, if~~If the~~ Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to paragraph (i) of this section, the Administrator will notify the permitting authority and the permittee of such finding in writing.

(2) The permitting authority shall, within 90 days after receipt of such notification, forward to EPA a proposed determination of termination, revision,~~modification,~~ or revocation and reissuance, as appropriate. The Administrator may extend this 90-day

period for an additional 90 days if he ~~or she~~ finds that a new or revised permit application is necessary or that the permitting authority must require the permittee to submit additional information.

(3) The Administrator will review the proposed determination from the permitting authority within 90 days of receipt.

(4) The permitting authority shall have 90 days from receipt of an EPA objection to resolve any objection that EPA makes and to terminate, revise, ~~modify,~~ or revoke and reissue the permit in accordance with the Administrator's objection.

(5) If the permitting authority fails to submit a proposed determination pursuant to paragraph (j)(2) of this section or fails to resolve any objection pursuant to paragraph (j)(4) of this section, the Administrator will terminate, revise, ~~modify,~~ or revoke and reissue the permit after taking the following actions:

(i) Providing at least 30 days notice to the permittee in writing of the reasons for any such action. This notice may be given during the procedures in paragraphs (j)(1) through (4) of this section.

(ii) Providing the permittee an opportunity for comment on the Administrator's proposed action and an opportunity for a hearing.

~~(k) Public participation. Except for revisions qualifying for minor permit revision procedures, de minimis~~

~~revision procedures, or administrative amendments, all permit proceedings, including initial permit issuance, significant permit revisions, reopenings, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit in accordance with this paragraph (k) of this section. These procedures shall include the following:~~

~~(1) Notice shall be given: by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice; to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public;~~

~~(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit revision; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in § 70.4(b)(3)(viii), and all other materials available to the permitting authority that are relevant to the permit decision; a brief description of the comment procedures~~

~~required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);~~

~~(3) The permitting authority shall provide such notice and opportunity for participation by affected States as is provided for by § 70.8;~~

~~(4) The permitting authority shall provide at least 30 days for public comment and shall give notice of any public hearing at least 30 days in advance of the hearing.~~

~~(5) The permitting authority shall keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill his or her obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and such records shall be available to the public.~~

§ 71.8 Affected State Review.

(a) Notice of draft permits. When a part 71 operating permits program becomes effective in a State or Tribal area, the permitting authority shall provide notice of each draft permit to any affected State, as defined in § 71.2 of this part, on or before the time that the permitting authority provides this notice to the public pursuant to § 71.7(e)(4), 71.7(h), 71.7(i) or 71.11(d) of this part and shall provide any affected State a copy of the addendum for a de minimis permit revision within 7 days of the date on which the addendum takes effect.

(b) Notice of refusal to accept recommendations. Prior to issuance of the final permit, the permitting authority shall notify any affected State (and the Administrator, in the case of a program delegated pursuant to § 71.10 of this part) in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public or affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part.

(c) Waiver of notice. The Administrator may waive the requirements of paragraph (a) of this section for any category of sources (including any class, type, or size within such category) other than major sources by regulation for a category of sources nationwide.

~~§ 70.8 Permit review by the EPA and affected States.~~

~~(a) Transmission of information to the Administrator.~~

~~(1) The permit program shall require that the permitting authority provide to the Administrator a copy of each permit application (including any application for permit revision), each proposed permit, and each final part 70 permit. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the~~

~~permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system.~~

~~(2) The Administrator may waive the requirements of paragraphs (a)(1) and (b)(1) of this section for any category of sources (including any class, type, or size within such category) other than major sources according to the following:~~

~~(i) By regulation for a category of sources nationwide, or~~

~~(ii) At the time of approval of a State program for a category of sources covered by an individual permitting program.~~

~~(3) Each State permitting authority shall keep for 5 years such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of this part.~~

~~(b) Review by affected States.~~

~~(1) The permit program shall provide that the permitting authority give notice of each draft permit to any affected State on or before the time that the permitting~~

~~authority provides this notice to the public under §§ 70.7(e), (f), (g), and (k).~~

~~(2) The permit program shall provide that the permitting authority, as part of the submittal of the proposed permit to the Administrator shall notify the Administrator and any affected State in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public or affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part.~~

~~(c) EPA objection.~~

~~(1) Except as provided in § 70.7(a)(7), the Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. No permit for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information.~~

~~(2) Any EPA objection under paragraph (c)(1) of this section shall include a statement of the Administrator's reasons for objection and a description of the terms and~~

~~conditions that the permit must include to respond to the objections. The Administrator will provide the permit applicant a copy of the objection.~~

~~(3) Failure of the permitting authority to do any of the following also shall constitute grounds for an objection:~~

~~(i) Comply with paragraphs (a) or (b) of this section;~~

~~(ii) Submit any information necessary to review adequately the proposed permit; or~~

~~(iii) Process the permit under the procedures approved to meet the requirements of § 70.7.~~

~~(4) If the permitting authority fails, within 90 days after the date of an objection under paragraph (c)(1) of this section, to revise and submit a proposed permit in response to the objection, the Administrator will issue or deny the permit in accordance with the requirements of the Federal program promulgated under title V of this Act.~~

~~(d) Public petitions to the Administrator. The program shall provide that, if the Administrator does not object in writing under paragraph (c) of this section, any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection. The program shall also provide that the public have access to information concerning the beginning and expiration of EPA's 45-day review period as required for permit issuance, revisions, reopenings, and renewals pursuant to § 70.7. Any petition shall be based~~

~~only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in §§ 70.7 (e), (f), (g), or (k), whichever is applicable, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to an EPA objection. If the permitting authority has issued a permit prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in §§ 70.7(j)(4) or (5)(i) and (ii) except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.~~

~~(e) Prohibition on default issuance. Consistent with § 70.4(b)(3)(ix), for the purposes of Federal law and title V of the Act, no State program may provide that a part 70 permit (including a permit renewal or revision) will issue until affected States and EPA have had an opportunity~~

~~to review the proposed permit as required under this section. When the program is submitted for EPA review, the State Attorney General or independent legal counsel shall certify that no applicable provision of State law requires that a part 70 permit or renewal be issued after a certain time if the permitting authority has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit), unless EPA has waived such review for EPA and affected States. Notwithstanding this prohibition on default permit issuance, permits may be revised on a default basis consistent with the procedures in §§ 70.7(e) and (f).~~

§ 71.9 Permit Fees.

(a) Fee requirement. The owners or operators of part 71 sources shall pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs, in accordance with the procedures described in this section.

(b) Permit program costs. These costs include, but are not limited to, the costs of the following activities as they relate to a part 71 program:

(1) Preparing generally applicable guidance regarding the permit program or its implementation or enforcement;

(2) Reviewing and acting on any application for a permit, permit revision, or permit renewal, including the development of an applicable requirement as part of the processing of a permit, or permit revision or renewal;

(3) Processing permit reopenings;

(4) General administrative costs of the permit program, including transition planning, interagency coordination, contract management, training, informational services and outreach activities, assessing and collecting fees, the tracking of permit applications, compliance certifications, and related data entry;

(5) Implementing and enforcing the terms of any part 71 permit (not including any court costs or other costs associated with an enforcement action), including adequate resources to determine which sources are subject to the program;

(6) Emissions and ambient monitoring, modeling, analyses, demonstrations, preparation of inventories, and tracking emissions, provided these activities are needed in order to issue and implement part 71 permits; and

(7) Providing direct and indirect support to small business stationary sources in determining applicable requirements and in receiving permits under this part (to the extent that these services are not provided by a State Small Business Stationary Source Technical and Environmental Compliance Assistance Program).

(c) Establishment of fee schedule.

(1) For part 71 programs that are administered by EPA, each part 71 source shall pay an annual fee in the amount of $45 dollars per ton [as adjusted pursuant to the criteria set forth in paragraph (n)(1) of this section] times the

total tons of the actual emissions of each regulated pollutant (for fee calculation) emitted from the source, including fugitive emissions.

(2) For part 71 programs that are delegated pursuant to § 71.10 of this part, the annual fee for each part 71 source shall be the amount specified in paragraph (c)(1) of this section plus a surcharge of $3 per ton per year. The surcharge will be used to defray the Agency's cost of administering program delegation.

(3) For part 71 programs that are administered by EPA with contractor assistance, the per ton fee will vary depending on the extent of contractor involvement. For part 71 programs which employ contractor assistance for all activities for which such assistance is appropriate, the per ton fee amount shall be $74 per ton [as adjusted pursuant to the criteria set forth in paragraph (n)(1) of this section] times the total tons of the actual emissions of each regulated pollutant (for fee calculation) emitted from the source, including fugitive emissions. For part 71 programs which rely to a lesser extent on contractor assistance the per ton fee will be determined by the following formula:

$$\text{Cost per ton} = (E \times \$45) + [(1-E) \times \$74] + \$3 \text{ surcharge}$$

Where E represents EPA's proportion of total effort (expressed as a percentage of total effort) needed to administer the part 71 program and $1-E$ represents the contractor's effort.

The $3 surcharge covers EPA's cost for administering contractor permit program activities.

(4) For programs that are delegated in part and that also use contractor assistance, the fee shall be computed using the formula in paragraph (c)(3) of this section, provided that *E* represents the proportion of total effort (expressed as a percentage) expended by EPA and the delegate agency.

(5) The following emissions shall be excluded from the calculation of fees under paragraph (c)(1) of this section:

(i) The amount of a part 71 source's actual emissions of each regulated pollutant (for fee calculation) that the source emits in excess of four thousand (4,000) tons per year;

(ii) A part 71 source's actual emissions of any regulated pollutant (for fee calculation) already included in the fee calculation; and

(iii) The insignificant quantities of actual emissions not required to be listed or calculated in a permit application pursuant to § 71.5(g) of this part.

(6) "Actual emissions" means the actual rate of emissions in tons per year of any regulated pollutant (for fee calculation) emitted from a part 71 source over the preceding calendar year. Actual emissions shall be calculated using each emissions unit's actual operating hours, production rates, in-place control equipment, and

types of materials processed, stored, or combusted during the preceding calendar year.

(7) Notwithstanding the above, if the Administrator determines that the fee structures provided in paragraphs (c)(1)-(4) of this section do not reflect the costs of administering a part 71 program, then the Administrator shall by rule set a fee which adequately reflects permit program costs for that program.

(d) Prohibition on fees with respect to emissions from affected units. Notwithstanding any other provision of this section, during the years 1995 through 1999 inclusive, no fee for purposes of title V shall be required to be paid with respect to emissions from any affected unit under section 404 of the Act.

(e) Submission of initial fee calculation work sheets and fees.

(1) Each part 71 source shall complete and submit an initial fee calculation work sheet as provided in paragraphs (e)(2), (f), and (g) of this section and shall complete and submit fee calculation work sheets thereafter as provided in paragraph (h) of this section. Calculations of actual or estimated emissions and calculation of the fees owed by a source shall be computed by the source on fee calculation work sheets provided by EPA. Fee payment must accompany each fee calculation work sheet.

(2) The fee calculation work sheet shall require the source to submit a report of its actual emissions for the

preceding calendar year and to compute fees owed based on those emissions. For sources that have been issued part 70 or part 71 permits, actual emissions shall be computed using compliance methods required by the most recent permit. If actual emissions cannot be determined using the compliance methods in the permit, the actual emissions should be determined using federally recognized procedures. If a source commenced operation during the preceding calendar year, the source shall estimate its actual emissions for the current calendar year. In such a case, fees for the source shall be based on the total emissions estimated.

(f) Deadlines for submission.

(1) When EPA withdraws approval of a part 70 program and implements a part 71 program, part 71 sources shall submit initial fee calculation work sheets and fees in accordance with the following schedule:

(i) Sources having SIC codes between 0100 and 2499 inclusive shall complete and submit fee calculation work sheets and fees within 4 months of the effective date of the part 71 program;

(ii) Sources having SIC codes between 2500 and 2999 inclusive shall complete and submit fee calculation work sheets and fees within 5 months of the effective date of the part 71 program;

(iii) Sources having SIC codes between 3000 and 3999 inclusive shall complete and submit fee calculation work

sheets and fees within 6 months of the effective date of the part 71 program;

(iv) Sources having SIC codes higher than 3999 shall complete and submit fee calculation work sheets and fees within 7 months of the effective date of the part 71 program.

(2) Sources that are required under either paragraph (f)(1) or (g) of this section to submit fee calculation work sheets and fees between January 1 and March 31 may estimate their emissions for the preceding calendar year in lieu of submitting actual emissions data. If the source's initial fee calculation work sheet was based on estimated emissions for the source's preceding calendar year, then the source shall reconcile the fees owed when it submits its annual emissions report, as provided in paragraph (h)(3) of this section.

(3) When EPA implements a part 71 program that does not replace an approved part 70 program, part 71 sources shall submit initial fee calculation work sheets and fees when submitting their permit applications in accordance with the requirements of § 71.5(b)(1) of this part.

(4) Notwithstanding the above, sources that become subject to the part 71 program after the program's effective date shall submit an initial fee calculation work sheet and fees when submitting their permit applications in accordance with the requirements of § 71.5(b)(1) of this part.

(g) Fees for sources that are issued part 71 permits following an EPA objection pursuant to § 71.4(e) of this part. Fees for such sources shall be determined as provided in paragraph (c) of this section. However, initial fee calculation work sheet for such sources shall be due three months after the date on which the source's part 71 permit is issued.

(h) Annual emissions reports.

(1) Deadlines for submission. Each part 71 source shall submit an annual report of its actual emissions for the preceding calendar year and a fee calculation work sheet (based on the report) each year on the anniversary date of its initial fee calculation work sheet, except that sources that were required to submit initial fee calculation work sheets between January 1 and March 31 inclusive shall submit subsequent annual emissions reports and fee calculation work sheets on April 1.

(2) For sources that have been issued part 70 or part 71 permits, actual emissions shall be computed using methods required by the most current permit for determining compliance.

(3) If the source's initial fee calculation work sheet was based on estimated emissions for the source's current or preceding calendar year, then the source shall reconcile the fees owed when it submits its annual emissions report. The source shall compare the estimated emissions from the initial work sheet and the actual emissions from the report

and shall enter such information on the fee calculation work sheet that accompanies the annual report. The source shall recompute the initial fee accordingly and shall remit any underpayment with the report and work sheet. The EPA shall credit any overpayment to the source's account.

(i) Recordkeeping requirements. Part 71 sources will retain, in accordance with the provisions of § 71.6(e) of this part, all work sheets and other materials used to determine fee payments. Records shall be retained for 5 years following the year in which the emissions data is submitted.

(j) Fee assessment errors.

(1) If EPA determines than a source has completed the fee calculation work sheet incorrectly, the permitting authority shall bill the applicant for the corrected fee or credit overpayments to the source's account.

(2) Each source notified by the permitting authority of additional amounts due shall remit full payment within 30 days of receipt of an invoice from the permitting authority.

(3) An owner or operator of a part 71 source who thinks that the assessed fee is in error shall provide a written explanation of the alleged error to the permitting authority along with the assessed fee. The permitting authority shall, within 90 days of receipt of the correspondence, review the data to determine whether the assessed fee was in error. If an error was made, the

overpayment shall be credited to the account of the part 71 source.

(k) Remittance procedure.

(1) Each remittance under this section shall be in United States currency and shall be paid by money order, bank draft, certified check, corporate check, or electronic funds transfer payable to the order of the U.S. Environmental Protection Agency.

(2) Each remittance shall be sent to the Environmental Protection Agency to the address designated on the fee calculation work sheet or the invoice.

(l) Penalty and interest assessment.

(1) The permitting authority shall assess interest on payments which are received later than the date due. The interest rate shall be the sum of the Federal short-term rate determined by the Secretary of the Treasury in accordance with section 6621(a)(2) of the Internal Revenue Code of 1986, plus 3 percentage points.

(2) The permitting authority shall assess a penalty charge of 50 percent of the fee amount if the fee is not paid within 30 days of the payment due date.

(3) Part 71 sources shall be assessed a penalty of 50 percent on underpayments computed under paragraph (h)(3) of this section when the underpayment is in excess of 20 percent of the initial estimated fee amount and interest as computed under paragraph (l)(1) of this section on that

portion of the underpayment in excess of 20 percent of the initial fee amount.

(m) Failure to remit fees. The permitting authority shall not issue a final permit or permit revision until all fees, interest and penalties assessed against a source under this section are paid. The initial application of a source shall not be found complete unless the source has paid all fees owed.

(n) Adjustments of fee schedules.

(1) The fee schedules provided in paragraphs (c)(1)-(4) of this section shall remain in effect until December 31, 1996. Thereafter, the fee schedules shall be changed annually by the percentage, if any, of any annual increase in the Consumer Price Index.

(2) Part 71 permit program costs and fees will be reviewed by the Administrator at least every two years, and changes will be made to the fee schedule as necessary to reflect permit program costs.

(3) When changes to a fee schedule are made based on periodic reviews by the Administrator, the changes will be published in the Federal Register as a proposed rule.

(o) Use of revenue. All fees, penalties, and interest collected under this part shall be deposited in a special fund in the U.S. Treasury, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the activities required by this part.

~~**§ 70.9 Fee determination and certification.**~~

~~(a) Fee Requirement. The State program shall require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs.~~

~~(b) Fee schedule adequacy.~~

~~(1) The State program shall establish a fee schedule that results in the collection and retention of revenues sufficient to cover the permit program costs. These costs include, but are not limited to, the costs of the following activities as they relate to the operating permit program for stationary sources:~~

~~(i) Preparing generally applicable regulations or guidance regarding the permit program or its implementation or enforcement;~~

~~(ii) Reviewing and acting on any application for a permit, permit revision, or permit renewal, including the development of an applicable requirement as part of the processing of a permit, or permit revision or renewal;~~

~~(iii) General administrative costs of running the permit program, including the supporting and tracking of permit applications, compliance certification, and related data entry;~~

~~(iv) Implementing and enforcing the terms of any part 70 permit (not including any court costs or other costs~~

~~associated with an enforcement action), including adequate resources to determine which sources are subject to the program;~~

~~(v) Emissions and ambient monitoring;~~

~~(vi) Modeling, analyses, or demonstrations;~~

~~(vii) Preparing inventories and tracking emissions; and~~

~~(viii) Providing direct and indirect support to sources under the Small Business Stationary Source Technical and Environmental Compliance Assistance Program contained in section 507 of the Act in determining and meeting their obligations under this part.~~

~~(2)(i) The Administrator will presume that the fee schedule meets the requirements of paragraph (b)(1) of this section if it would result in the collection and retention of an amount not less than $25 per year (as adjusted pursuant to the criteria set forth in paragraph (b)(2)(iv) of this section) times the total tons of the actual emissions of each regulated pollutant (for presumptive fee calculation) emitted from part 70 sources.~~

~~(ii) The State may exclude from such calculation:~~

~~(A) The actual emissions of sources for which no fee is required under paragraph (b)(4) of this section;~~

~~(B) The amount of a part 70 source's actual emissions of each regulated pollutant (for presumptive fee calculation) that the source emits in excess of four thousand (4,000) tpy;~~

~~(C) A part 70 source's actual emissions of any regulated pollutant (for presumptive fee calculation), the emissions of which are already included in the minimum fees calculation; or~~

~~(D) The insignificant quantities of actual emissions not required in a permit application pursuant to § 70.5(c).~~

~~(iii) "Actual emissions" means the actual rate of emissions in tons per year of any regulated pollutant (for presumptive fee calculation) emitted from a part 70 source over the preceding calendar year or any other period determined by the permitting authority to be representative of normal source operation and consistent with the fee schedule approved pursuant to this section. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and in-place control equipment, types of materials processed, stored, or combusted during the preceding calendar year or such other time period established by the permitting authority pursuant to the preceding sentence.~~

~~(iv) The program shall provide that the $25 per ton per year used to calculate the presumptive minimum amount to be collected by the fee schedule, as described in paragraph (b)(2)(i) of this section, shall be increased each year by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the~~

~~beginning of such year exceeds the Consumer Price Index for the calendar year 1989.~~

~~(A) The Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year.~~

~~(B) The revision of the Consumer Price Index which is most consistent with the Consumer Price Index for the calendar year 1989 shall be used.~~

~~(3) The State program's fee schedule may include emissions fees, application fees, service-based fees or other types of fees, or any combination thereof, to meet the requirements of paragraph (b)(1) or (b)(2) of this section. Nothing in the provisions of this section shall require a permitting authority to calculate fees on any particular basis or in the same manner for all part 70 sources, all classes or categories of part 70 sources, or all regulated air pollutants, provided that the permitting authority collects a total amount of fees sufficient to meet the program support requirements of paragraph (b)(1) of this section.~~

~~(4) Notwithstanding any other provision of this section, during the years 1995 through 1999 inclusive, no fee for purposes of title V shall be required to be paid~~

~~with respect to emissions from any affected unit under section 404 of the Act.~~

~~(5) The State shall provide a detailed accounting that its fee schedule meets the requirements of paragraph (b)(1) of this section if:~~

~~(i) The State sets a fee schedule that would result in the collection and retention of an amount less than that presumed to be adequate under paragraph (b)(2) of this section; or~~

~~(ii) The Administrator determines, based on comments rebutting the presumption in paragraph (b)(2) of this section or on his own initiative, that there are serious questions regarding whether the fee schedule is sufficient to cover the permit program costs.~~

~~(c) Fee demonstration. The permitting authority shall provide a demonstration (and periodic updates as required by the Administrator) that the fee schedule selected will result in the collection and retention of fees in an amount sufficient to meet the requirements of this section.~~

~~(d) Use of Required Fee Revenue. The Administrator will not approve a demonstration as meeting the requirements of this section, unless it contains an initial accounting (and periodic updates as required by the Administrator) of how required fee revenues are used solely to cover the costs of meeting the various functions of the permitting program.~~

§ 71.10 Delegation of Part 71 Program.

(a) Delegation of part 71 program. The Administrator may delegate, in whole or in part, with or without signature authority, the authority to administer a part 71 operating permits program to a State, eligible Tribe, local, or other non-State agency in accordance with the provisions of this section. In order to be delegated authority to administer a part 71 program, the delegate agency must submit a legal opinion from the Attorney General from the State, or the attorney for the State, local, interstate, or eligible Tribal agency that has independent legal counsel, stating that the laws of the State, locality, interstate compact or Indian tribe provide adequate authority to carry out all aspects of the delegated program. A Delegation of Authority Agreement (Agreement) shall set forth the terms and conditions of the delegation, shall specify the provisions of this part that the delegate agency shall be authorized to implement, and shall be entered into by the Administrator and the delegate agency. The Agreement shall become effective upon the date that both the Administrator and the delegate agency have signed the Agreement. Once delegation becomes effective, the delegate agency will be responsible, to the extent specified in the Agreement, for administering the part 71 program for the area subject to the Agreement.

(b) Publication of Delegation of Authority Agreement. The Agreement shall be published in the Federal Register.

(c) Revision or revocation of Delegation of Authority Agreement. An Agreement may be modified, amended, or revoked, in part or in whole, by the Administrator after consultation with the delegate agency.

(d) Transmission of information to the Administrator.

(1) When a part 71 program has been delegated in accordance with the provisions of this section, the delegate agency shall provide to the Administrator a copy of each application for a permit, permit renewal, or permit revision (including any compliance plan, or any portion the Administrator determines to be necessary to review the application and permit effectively), each proposed permit, and each final part 71 permit.

(2) The applicant may be required by the delegate agency to provide a copy of the permit application (including the compliance plan) directly to the Administrator.

(3) Upon agreement with the Administrator, the delegate agency may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system.

(e) Retention of records. The records for each draft, proposed, and final permit, and application for permit

renewal or revision shall be kept for a period of 5 years by the delegate agency. The delegate agency shall also submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the delegate agency is implementing, administering, and enforcing the delegated part 71 program in compliance with the requirements of the Act and of this part.

(f) Prohibition of default issuance.

(1) For the purposes of Federal law and title V of the Act, when a part 71 program has been delegated in accordance with the provisions of this section, no part 71 permit (including a permit renewal or revision) will be issued until affected States and EPA have had an opportunity to review the draft permit as required pursuant to § 71.8(a) of this part and EPA has had an opportunity to review the proposed permit.

(2) To receive delegation of signature authority, the legal opinion submitted by the delegate agency pursuant to paragraph (a) of this section shall certify that no applicable provision of State, local or tribal law requires that a part 71 permit or renewal be issued after a certain time if the delegate agency has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit), unless EPA has waived such review for EPA and affected States. Notwithstanding this prohibition on default permit issuance,

permits may be revised on a default basis pursuant to the procedures in §§ 71.7(e) and (f) of this part.

(g) EPA objection.

(1) No permit for which an application must be transmitted to the Administrator under paragraph (d)(1) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information. When a part 71 program has been delegated in accordance with the provisions of this section, failure of the delegate agency to do any of the following shall constitute grounds for an objection by the Administrator:

(i) Comply with paragraph (d) of this section;

(ii) Submit any information necessary to review adequately the proposed permit;

(iii) Process the permit under the procedures required by §§ 71.7 and 71.11 of this part;

(iv) Propose or issue a part 71 permit that complies with applicable requirements of the Act or the requirements under this part, except as provided in § 71.7(a)(6) of this part; or

(v) Comply with the requirements of § 71.8(a) of this part.

(2) Any EPA objection under paragraph (g)(1) of this section shall include a statement of the Administrator's reason(s) for objection and a description of the terms and conditions that the permit must include to respond to the

objection. The Administrator will provide the permit applicant a copy of the objection.

(3) If the delegate agency fails, within 90 days after the date of an objection under paragraph (g)(1) of this section, to revise and submit to the Administrator the proposed permit in response to the objection, the proposed permit shall not issue and thereafter the Administrator shall issue a part 71 permit to the applicant in accordance with the requirements of this part.

(h) Public petitions to the Administrator.

(1) If the Administrator does not object in writing to the issuance of a part 71 permit under paragraph (g)(1) of this section, any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such an objection. The delegate agency shall provide public access to information concerning the beginning and expiration of EPA's 45-day review period as required for permit issuance, revisions, reopenings and renewals. Any public petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in §§ 71.7(e), (f), or (g), and 71.11 of this part, whichever is applicable, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.

(2) During the Administrator's 45-day review period, the delegate agency shall provide notice as to the expiration of the Administrator's 45-day review period in the same manner and publication as the initial public notice or by notice to individual commenters.

(3) If the Administrator objects to the permit as a result of a petition filed pursuant to paragraph (h)(1) of this section, the delegate agency shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to an EPA objection.

(4) If a part 71 permit has been issued prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in § 71.7(j) of this part, except in unusual circumstances, and the delegate agency may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

(i) Appeal of permits. When a part 71 program has been delegated with signature authority in accordance with the provisions of this section, any permit applicant and any person or affected State that submitted recommendations or comments on the draft permit, or that participated in the

public hearing process may petition the Environmental Appeals Board in accordance with § 71.11(l)(1) of this part.

(j) Nondelegable conditions.

(1) The Administrator's authority to object to the issuance of a part 71 permit cannot be delegated to an agency not within EPA.

(2) The Administrator's authority to act upon petitions submitted pursuant to paragraph (h)(1) of this section cannot be delegated to an agency not within EPA.

~~**§ 70.10 Federal oversight and sanctions.**~~

~~(a) Failure to submit an approvable program.~~

~~(1) If a State fails to submit a complete part 70 program in a timely manner, or a required revision thereto (including revisions to correct deficiencies of a program that the Administrator had granted interim approval), in conformance with the provisions of § 70.4, or if the Administrator disapproves a submitted program:~~

~~(i) The Administrator may, prior to the expiration of the 18-month period referred to in paragraph (a)(1)(ii) of this section, apply any one of the sanctions specified in section 179(b) of the Act; and~~

~~(ii) Eighteen months after the date required for submittal or 18 months after the date of disapproval, whichever is applicable, the Administrator will apply sanctions under section 179(b) of the Act in the same manner and subject to the same deadlines and other conditions as~~

~~are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.~~

~~(2) The sanctions under section 179(b)(2) of the Act shall not apply pursuant to paragraph (1) of this section in any area unless the area has been designated a nonattainment area under part D of title I of the Act.~~

~~(3) The Administrator will promulgate, administer, and enforce a whole program, or a partial program as appropriate, for such State when:~~

~~(i) Full approval of a whole part 70 program has not been granted by November 15, 1995, except for programs granted interim approval; or~~

~~(ii) For programs granted interim approval, that approval has expired after November 15, 1995 and EPA has not granted full approval of a whole part 70 program.~~

~~(b) State failure to administer or enforce. Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part and of any agreement between the State and the Administrator concerning operation of the program.~~

~~(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering or enforcing a part 70 program, or any portion thereof, the Administrator will notify the permitting authority of the determination and the reasons therefore. The Administrator will publish such notice in the FEDERAL REGISTER.~~

~~(2) If, 90 days after issuing the notice under paragraph (b)(1) of this section, the permitting authority fails to take significant action to assure adequate administration and enforcement of the program, the Administrator may take one or more of the following actions:~~

~~(i) Withdraw approval of the program or portion thereof using procedures consistent with § 70.4(e);~~

~~(ii) Apply any of the sanctions specified in section 179(b) of the Act;~~

~~(iii) Promulgate, administer, or enforce a Federal program under title V of the Act.~~

~~(3) Whenever the Administrator has made the finding and issued the notice under paragraph (b)(1) of this section, the Administrator will apply the sanctions under section 179(b) of the Act 18 months after that notice. These sanctions will be applied in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.~~

~~(4) Whenever the Administrator has made the finding and issued the notice under paragraph (b)(1) of this section, the Administrator will, unless the State has corrected such deficiency within 18 months after the date of such finding, promulgate, administer, and enforce, a whole or partial program 2 years after the date of such finding.~~

~~(5) Nothing in this section shall limit the Administrator's authority to take any enforcement action~~

~~against a source for violations of the Act or of a permit issued under rules adopted pursuant to this section in a State that has been delegated responsibility by EPA to implement a Federal program promulgated under title V of the Act.~~

~~(6) Where a whole State program consists of an aggregate of partial programs, and one or more partial programs fails to be fully approved or implemented, the Administrator may apply sanctions only in those areas for which the State failed to submit or implement an approvable program.~~

~~(c) Criteria for withdrawal of State programs.~~

~~(1) The Administrator may, in accordance with the procedures of paragraph (c) of this section, withdraw program approval in whole or in part whenever the approved program no longer complies with the requirements of this part, and the permitting authority fails to take corrective action. Such circumstances, in whole or in part, include any of the following:~~

~~(i) Where the permitting authority's legal authority no longer meets the requirements of this part, including the following:~~

~~(A) The permitting authority fails to promulgate or enact new authorities when necessary; or~~

~~(B) The State legislature or a court strikes down or limits State authorities to administer or enforce the State program.~~

~~(ii) Where the operation of the State program fails to comply with the requirements of this part, including the following:~~

~~(A) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;~~

~~(B) Repeated issuance of permits that do not conform to the requirements of this part;~~

~~(C) Failure to comply with the public participation requirements of § 70.7;~~

~~(D) Failure to collect, retain, or allocate fee revenue consistent with § 70.9; or~~

~~(E) Failure in a timely way to act on any applications for permits including renewals and revisions.~~

~~(iii) Where the State fails to enforce the part 70 program consistent with the requirements of this part, including the following:~~

~~(A) Failure to act on violations of permits or other program requirements;~~

~~(B) Failure to seek adequate enforcement penalties and fines and collect all assessed penalties and fines; or~~

~~(C) Failure to inspect and monitor activities subject to regulation.~~

~~(d) Federal collection of fees. If the Administrator determines that the fee provisions of a part 70 program do not meet the requirements of § 70.9, or if the Administrator makes a determination under paragraph (c)(1) of this~~

~~section that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under title V of the Act, collect reasonable fees to cover the Administrator's costs of administering the provisions of the permitting program promulgated by the Administrator, without regard to the requirements of § 70.9.~~

~~(e) This section shall apply to the acid rain program except as otherwise provided by regulations promulgated pursuant to title IV of the Act.~~

§ 71.11 Administrative record, public participation, and administrative review.

The provisions of paragraphs (a) through (j) of this section shall apply to initial permit issuance, permit renewals, permit reopenings, and significant permit revisions, but not to permit revisions qualifying for minor permit revision procedures, de minimis permit revision procedures, or administrative amendments. The provisions of paragraphs (k), (l), and (m) of this section shall apply to all permit proceedings.

(a) Draft permits.

(1) The permitting authority shall promptly provide notice to the applicant of whether the application is complete pursuant to § 71.7(a)(3) of this part.

(2) Once an application for an initial permit, permit revision, or permit renewal is complete, the permitting

authority shall decide whether to prepare a draft permit or to deny the application.

(3) If the permitting authority initially decides to deny the permit application, it shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit and follows the same procedures as any draft permit prepared under this section. If the permitting authority's final decision is that the initial decision to deny the permit application was incorrect, it shall withdraw the notice of intent to deny and proceed to prepare a draft permit under paragraph (a)(4) of this section.

(4) If the permitting authority decides to prepare a draft permit, it shall prepare a draft permit that contains the permit conditions required under § 71.6 of this part.

(5) All draft permits prepared under this section shall be publicly noticed and made available for public comment.

(b) Statement of basis. The permitting authority shall prepare a statement of basis for every draft permit subject to this section. The statement of basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or in the case of notices of intent to deny or terminate, reasons supporting the initial decision. The statement of basis shall be sent to the applicant and, on request, to any other person.

(c) Administrative record for draft permits.

(1) The provisions of a draft permit shall be based on the administrative record defined in this section.

(2) For preparing a draft permit, the administrative record shall consist of:

(i) The application and any supporting data furnished by the applicant;

(ii) The draft permit or notice of intent to deny the application or to terminate the permit;

(iii) The statement of basis;

(iv) All documents cited in the statement of basis; and

(v) Other documents contained in the supporting file for the draft permit.

(3) Material readily available at the permitting authority or published material that is generally available, and that is included in the administrative record under paragraphs (b) and (c) of this section need not be physically included with the rest of the record as long as it is specifically referred to in the statement of basis.

(d) Public notice of permit actions and public comment period.

(1) Scope.

(i) The permitting authority shall give public notice that the following actions have occurred:

(A) A permit application has been initially denied under paragraph (a) of this section;

(B) A draft permit has been prepared under paragraph (a) of this section;

(C) A hearing has been scheduled under paragraph (f) of this section;

(D) A public comment period has been reopened under paragraph (h) of this section;

(E) An appeal has been granted under paragraph (l)(3) of this section.

(ii) No public notice is required in the case of administrative permit revisions, or when a request for permit revision, revocation and reissuance, or termination has been denied under paragraph (a)(2) of this section. Written notice of that denial shall be given to the requester and to the permittee.

(iii) Public notices may describe more than one permit or permit action.

(2) Timing.

(i) Public notice of the preparation of a draft permit, (including a notice of intent to deny a permit application), shall allow at least 30 days for public comment.

(ii) Except as provided under § 71.7(g)(5)(ii)(C) of this part, public notice of a public hearing shall be given at least 30 days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.

(iii) The permitting authority shall provide such notice and opportunity for participation to affected States on or before the time that the permitting authority provides this notice to the public.

(3) Methods. Public notice of activities described in paragraph (d)(1)(i) of this section shall be given by the following methods:

(i) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under paragraph (d) of this section may waive his or her rights to receive notice for any permit):

(A) The applicant;

(B) Affected States;

(C) Air pollution control agencies of affected States, Tribal and local air pollution control agencies which have jurisdiction over the area in which the source is located, the chief executives of the city and county where the source is located, any comprehensive regional land use planning agency and any State or Federal Land Manager whose lands may be affected by emissions from the source;

(D) Any unit of local government including the local emergency planning committee, having jurisdiction over the area where the source is located and to each State agency having any authority under State law with respect to the operation of such source;

(E) Persons on a mailing list developed by:

(1) Including those who request in writing to be on the list;

(2) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

(3) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State funded newsletters, environmental bulletins, or State law journals. The permitting authority may update the mailing list from time to time by requesting written indication of continued interest from those listed. The permitting authority may delete from the list the name of any person who fails to respond to such a request.

(ii) By publication of a notice in a daily or weekly newspaper of general circulation within the area affected by the source.

(iii) By any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(4) Contents.

(i) All public notices. All public notices issued under this subpart shall contain the following minimum information:

(A) The name and address of the permitting authority processing the permit;

(B) The name and address of the permittee or permit applicant and, if different, of the facility regulated by the permit, except in the case of draft general permits;

(C) The activity or activities involved in the permit action;

(D) The emissions change involved in any permit revision;

(E) The name, address, and telephone number of a person whom interested persons may contact for instructions on how to obtain additional information, such as a copy of the draft permit, the statement of basis, the application, relevant supporting materials, and other materials available to the permitting authority that are relevant to the permitting decision.

(F) A brief description of the comment procedures required by paragraph (e) of this section, a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision;

(G) The location of the administrative record, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant are available as part of the administrative record; and

(H) Any additional information considered necessary or proper.

(ii) Public notices for hearings. Public notice of a hearing may be combined with other notices required under paragraph (d)(1) of this section. Any public notice of a hearing under paragraph (f) of this section shall contain the following information:

(A) The information described in paragraph (d)(4)(i) of this section;

(B) Reference to the date of previous public notices relating to the permit;

(C) The date, time, and place of the hearing; and

(D) A brief description of the nature and purpose of the hearing, including the applicable rules and the comment procedures.

(5) All persons identified in paragraphs (d)(3)(i)(A), (B), (C), (D), and (E) of this section shall be mailed a copy of the public hearing notice described in paragraph (d)(4)(ii) of this section.

(e) Public comments and requests for public hearings. During the public comment period provided under paragraph (a) of this section, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised at the hearing. All comments shall be considered in making the final decision and shall be answered as provided in paragraph (j) of this section. The permitting authority

will keep a record of the commenters and of the issues raised during the public participation process, and such records shall be available to the public.

(f) Public hearings.

(1) The permitting authority shall hold a hearing whenever it finds, on the basis of requests, a significant degree of public interest in a draft permit.

(2) The permitting authority may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.

(3) Public notice of the hearing shall be given as specified in paragraph (d) of this section.

(4) Whenever a public hearing is held, the permitting authority shall designate a Presiding Officer for the hearing who shall be responsible for its scheduling and orderly conduct.

(5) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under paragraph (d) of this section shall be automatically extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(6) A tape recording or written transcript of the hearing shall be made available to the public.

(g) Obligation to raise issues and provide information during the public comment period. All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the permitting authority's initial decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period (including any public hearing). Any supporting materials that are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. In the case of a program delegated pursuant to § 71.10 of this part, if requested by the Administrator, the permitting authority shall make supporting materials not already included in the administrative record available to EPA. The permitting authority may direct commenters to provide such materials directly to EPA. A comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted to the extent that a commenter who requests additional time demonstrates the need for such time.

(h) Reopening of the public comment period.

(1) The permitting authority may order the public comment period reopened if the procedures of paragraph (h) of this section could expedite the decision making process. When the public comment period is reopened under paragraph (h) of this section, all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the permitting authority's initial decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must submit all reasonably available factual grounds supporting their position, including all supporting material, by a date not less than 30 days after public notice under paragraph (h)(2) of this section, set by the permitting authority. Thereafter, any person may file a written response to the material filed by any other person, by a date, not less than 20 days after the date set for filing of the material, set by the permitting authority.

(2) Public notice of any comment period under this paragraph shall identify the issues to which the requirements of §§ 71.11 (h)(1)-(4) of this part shall apply.

(3) On its own motion or on the request of any person, the permitting authority may direct that the requirements of paragraph (h)(1) of this section shall apply during the initial comment period where it reasonably appears that issuance of the permit will be contested and that applying

the requirements of paragraph (h)(1) of this section will substantially expedite the decision making process. The notice of the draft permit shall state whenever this has been done.

(4) A comment period of longer than 30 days may be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they may be granted to the extent the permitting authority finds it necessary.

(5) If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the permitting authority may take one or more of the following actions:

(i) Prepare a new draft permit, appropriately modified;

(ii) Prepare a revised statement of basis, and reopen the comment period; or

(iii) Reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted.

(6) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused the reopening. The public notice shall define the scope of the reopening.

(7) Public notice of any of the above actions shall be issued under paragraph (d) of this section.

(i) Issuance and effective date of permit.

(1) After the close of the public comment period on a draft permit, the permitting authority shall issue a final permit decision. The permitting authority shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a permit. For the purposes of this section, a final permit decision means a final decision to issue, deny, revise, revoke and reissue, renew, or terminate a permit.

(2) A final permit decision shall become effective immediately upon issuance of the decision unless a later effective date is specified in the decision.

(j) Response to comments.

(1) At the time that any final permit decision is issued, the permitting authority shall issue a response to comments. This response shall:

(i) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(ii) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

(2) Any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in paragraph (K) of this section.

If new points are raised or new material supplied during the public comment period, the permitting authority may document its response to those matters by adding new materials to the administrative record.

(3) The response to comments shall be available to the public.

(4) The permitting authority will notify in writing any affected State of any refusal to accept recommendations for the permit that the State submitted during the public or Affected State review period.

(k) Administrative record for final permits.

(1) The permitting authority shall base final permit decisions on the administrative record defined in paragraph (k)(2) of this section.

(2) The administrative record for any final permit shall consist of:

(i) All comments received during any public comment period, including any extension or reopening;

(ii) The tape or transcript of any hearing(s) held;

(iii) Any written material submitted at such a hearing;

(iv) The response to comments and any new materials placed in the record;

(v) Other documents contained in the supporting file for the permit;

(vi) The final permit;

(vii) The application and any supporting data furnished by the applicant;

(viii) The draft permit or notice of intent to deny the application or to terminate the permit;

(ix) The statement of basis for the draft permit;

(x) All documents cited in the statement of basis;

(xi) Other documents contained in the supporting file for the draft permit.

(3) The additional documents required under paragraph (k)(2) of this section should be added to the record as soon as possible after their receipt or publication by the permitting authority. The record shall be complete on the date the final permit is issued.

(4) Material readily available at the permitting authority, or published materials which are generally available and which are included in the administrative record under the standards of paragraph (j) of this section need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or in the response to comments.

(l) Appeal of permits.

(1) Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. Any person who failed to file comments

or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. Except for revisions qualifying for minor permit revision procedures, de minimis permit revision procedures, or administrative amendments, the 30-day period within which a person may request review under this section begins with the service of notice of the permitting authority's action unless a later date is specified in that notice. For revisions processed pursuant to minor permit revision procedures, the 30-day period within which a person may request review under this section begins on the date after the permitting authority notifies the source and commenters of the final permit action. For revisions processed pursuant to de minimis permit revision procedures, the 30-day period within which a person may request review under this section begins on the date after the expiration of the permitting authority's period to disapprove the revision or revoke the revision in response to a citizen petition, whichever is applicable. For revisions processed pursuant to administrative amendment procedures, the 30-day period within which a person may request review under this section begins on the date following the expiration of the 60-day period after which the administrative amendment is effective. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues raised were raised during the public comment

period (including any public hearing) to the extent required by these regulations unless the petitioner demonstrates that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period, and, when appropriate, a showing that the condition in question is based on:

(i) A finding of fact or conclusion of law which is clearly erroneous; or

(ii) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(2) The Board may also decide on its initiative to review any condition of any permit issued under this part. The Board must act under paragraph (l) of this section within 30 days of the service date of notice of the permitting authority's action.

(3) Within a reasonable time following the filing of the petition for review, the Board shall issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Board under paragraph (l)(1) or (2) of this section shall be given as provided in paragraph (d) of this section. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review

shall be sent only to the permit applicant and to the person(s) requesting review.

(4) A petition to the Board under paragraph (l)(1) of this section is, under 42 U.S.C. § 307(b), a prerequisite to seeking judicial review of the final agency action.

(5) For purposes of judicial review, final agency action occurs when a final permit is issued or denied by the permitting authority and agency review procedures are exhausted. A final permit decision shall be issued by the permitting authority:

(i) When the Board issues notice to the parties that review has been denied;

(ii) When the Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(6) Neither the filing of a petition for review of any condition of the permit or permit decision nor the granting of an appeal by the Environmental Appeals Board shall stay the effect of any contested permit or permit condition.

(m) Computation of time.

(1) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(2) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event, except as otherwise provided.

(3) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(4) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.

~~**§ 70.11 Requirements for enforcement authority.**~~

~~All programs to be approved under this part must contain the following provisions:~~

~~(a) Enforcement authority. Any agency administering a program shall have the following enforcement authority to address violations of program requirements by part 70 sources:~~

~~(1) To restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment.~~

~~(2) To seek injunctive relief in court to enjoin any violation of any program requirement, including permit~~

~~conditions, without the necessity of a prior revocation of the permit.~~

~~(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, according to the following:~~

~~(i) Civil penalties shall be recoverable for the violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry or monitoring activities or, any regulation or orders issued by the permitting authority. These penalties shall be recoverable in a maximum amount of not less than $10,000 per day per violation. State law shall not include mental state as an element of proof for civil violations for which penalties up to $10,000 per day per violation are recoverable.~~

~~(ii) Criminal fines shall be recoverable against any person who knowingly violates any applicable requirement; any permit condition; or any fee or filing requirement. These fines shall be recoverable in a maximum amount of not less than $10,000 per day per violation.~~

~~(iii) Criminal fines shall be recoverable against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method. These~~

~~fines shall be recoverable in a maximum amount of not less than $10,000 per day per violation.~~

~~(b) Burden of proof. The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section shall be no greater than the burden of proof or degree of knowledge or intent required under the Act.~~

~~(c) Appropriateness of penalties and fines. A civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate to the violation.~~

§ 71.12 Prohibited acts.

Violations of any applicable requirement; any permit term or condition; any fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; or any regulation or order issued by the permitting authority pursuant to this part are violations of the Act and are subject to full Federal enforcement authorities available under the Act.

Cross references for redline/strikeout version of 70/71

part 70 section	page	part 71 section	page
70.3(c) emissions units	24	71.6(a)(1)(iv)	74
70.3(d) fugitive emissions	24	71.5(f)(3)(i)	64
70.4(b)(3)(viii) confidential information	37	71.5(d)	62
70.4(b)(12) op flex	42	71.6(p)	97
70.4(b)(14) off permit	46	71.6(q)	100
70.6(a)(3)(i) monitoring	75	71.6(d)	85
70.6(a)(3)(ii) recordkeeping	75	71.6(e)	86
70.6(a)(3)(iii) reporting	76	71.6(f)	87
70.6(c)(2) inspection/entry	83	71.6(h)	90
70.6(c)(3) compliance schedule	83	71.6(i)	91
70.6(c)(4) progress reports	83	71.6(j)	91
70.6(c)(5) compliance certification	84	71.6(g)	89
70.6(d)(2) general permits	93	71.5(h), 71.6(l)	72, 92
70.7(k) public participation	153	71.11	192-5
70.8(a)(1) info transfer to EPA	156	71.10(d)(1)	178
70.8(c) EPA objection	158	71.10(g)	180

70.8(d) public petitions to EPA	159	71.10(h)	181
70.8(e) default issuance	160	71.10(f)	179
70.9(b)(1) program costs	172	71.9(b)	161

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 71

[FRL -]

Federal Operating Permits Program

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed rule; notice of opportunity for public hearing.

SUMMARY: The EPA is proposing a new part 71 of chapter I of title 40 of the Code of Federal Regulations (CFR). This part will contain regulations setting forth the procedures and terms under which the Administrator will administer programs for issuing operating permits to covered stationary sources, pursuant to title V of the Clean Air Act as amended in 1990 (the Act) (42 U.S.C. §§ 7661 et seq.). Although the primary responsibility for issuing operating permits to such sources rests with State, local, and Tribal air agencies, EPA will administer a Federal operating permits program in certain limited situations described below.

First, EPA will administer a part 71 program when a State defaults on its obligation to develop an operating permits program that meets the requirements of title V of the Act and 40 CFR part 70. Pursuant to title V of the Act, EPA promulgated regulations (codified at 40 CFR part 70) that require and specify the minimum elements of State operating permits programs. States were required to develop and submit proposed programs to EPA by November 15, 1993. The EPA must act to approve or disapprove a State program

within 1 year of submittal by the State to EPA. If a State program is not approved in whole by November 15, 1995, EPA must establish a Federal program for the portion of the State that is not subject to an approved part 70 program.

The Administrator will also implement a Federal operating permits program: (1) when the Administrator determines that a State has defaulted on its obligation to adequately administer and enforce an approved operating permits program; and (2) when an Indian Tribe has not submitted an approvable operating permits program or fails to adequately administer and enforce an approved program. Using the procedures of part 71, EPA will also issue permits, under certain circumstances, to covered stationary sources that are located on the "outer continental shelf" (OCS) and will issue permits when EPA has objected to a permit issued or proposed to be issued by a State, local, or Tribal permitting agency and the agency fails to respond appropriately to EPA's objection.

The part 71 rules proposed in this action describe the framework for a Federal operating permits program that meets the requirements of title V. The part 71 rules have in large measure been patterned after the provisions of part 70, including the recently proposed revisions to part 70. See 40 CFR part 70 and 59 FR 44460 (Aug. 29, 1994). Where a provision in part 71 differs significantly from its counterpart in part 70 or the proposed revisions to

part 70, the rationale for the change is noted in the preamble discussion.

Like part 70, part 71 requires: (1) the use of a standard permit application form; (2) that sources subject to permitting requirements pay permit fees that assure adequate program resources and funding; and (3) permit issuance, appeal, and renewal procedures that ensure that each regulated source can obtain a permit that will assure compliance with all of its applicable requirements under the Act. Part 71 sources must obtain an operating permit addressing all applicable pollution control obligations under the State implementation plan (SIP), Federal implementation plan (FIP), or Tribal implementation plan (TIP); the acid rain program; the air toxics program under section 112; and other applicable provisions of the Act. Sources must also submit periodic reports to EPA concerning the extent of their compliance with permit obligations.

When EPA implements a part 71 program, it will cover only the geographic area that is not covered by an approved State, local, or Tribal program. For example, if a local agency within a State has an approved program but the entire State is not covered by an approved program, EPA's implementation of a part 71 program for the State would not affect the area subject to the approved local program.

In appropriate circumstances, EPA may delegate to a State, local, or Tribal permitting authority some or all of its authority to administer a part 71 program. The

responsibilities of EPA and the delegate agency will be set forth in a Delegation of Authority Agreement.

The EPA will generally cease implementation of a part 71 program subsequent to approval of a State operating permits program.

This preamble makes frequent use of the term "State," usually meaning the State air pollution control agency that would be the permitting authority for a part 70 permit program. The reader should assume that use of "State" may also include reference to a local air pollution agency. In some cases, the term "permitting authority" is used and can refer to State, local, and Tribal agencies. The term may also apply to EPA, where the Agency is the permitting authority of record.

DATES: Comments. Comments on the proposed regulations must be received by EPA's Air Docket on or before _____ [60 days after publication in the Federal Register]. The EPA is unlikely to be able to extend the public comment period. Two paper copies of each set of comments are requested. If possible, comments should be sent in both paper and computerized form. Comments generated on computer should be sent on an IBM-compatible diskette and clearly labeled. Computer files created with the WordPerfect 5.1 software package should be sent as is. Files created on other software packages should be saved in an "unformatted" mode for easy retrieval into WordPerfect.

Comments should refer to specific page numbers of today's proposal whenever possible.

Public Hearing. A public hearing is scheduled for 10:00 a.m., on _____ [30 days after publication in the Federal Register] at the address listed below. Requests to present oral testimony must be received by _____ [15 days after publication in the Federal Register], and the hearing may be canceled if no speakers have requested time to present their comments by that date. For information about the hearing, contact Carol Bradsher at (919) 541-5586. Written comments in lieu of, or in addition to, testimony are encouraged.

Docket. Supporting information used in developing the proposed rules is contained in Docket No. A-93-51. Supporting information used in developing 40 CFR part 70 is contained in Dockets No. A-90-33 and No. A-93-50. These dockets are available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday, at EPA's Air Docket, Room M-1500, Waterside Mall, 401 M Street SW, Washington, D.C. 20460. A reasonable fee may be charged for copying.

ADDRESSES: Comments should be mailed (in duplicate if possible) to: EPA Air Docket (Mail Code 6102), Attn: Docket No. A-93-51, Room M-1500, Waterside Mall, 401 M Street SW, Washington, DC 20460. The public hearing will be held in the Waterside Mall auditorium at the U. S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Candace Carraway (telephone 919/541-3189) or Kirt Cox (telephone 919/541-5399), U. S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Management Division, Mail Drop 15, Research Triangle Park, North Carolina 27711. Persons interested in attending the hearing or wishing to present oral testimony should contact Ms. Carol Bradsher in writing at the U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Management Division, Mail Drop 15, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Background and Purpose

Title V of the Act imposes on States the duty to develop, administer, and enforce operating permits programs that comply with the requirements of title V (section 502(d)(1)). The EPA has 1 year to approve or

disapprove a submitted program (section 502(d)(1)). Once EPA has approved a State program, the covered sources within that program's scope have 1 year to submit permit applications to the permitting authority (section 503(c)) unless the permitting authority establishes an earlier date. Within the first 3 years of the program, the permitting authority must act on all applications submitted in the first year of the program (section 503(c)), and EPA must have an opportunity to object to the proposed permit if it does not comply with the Act's requirements (section 505(b)). Once the permitting authority issues a source its permit, the source may not violate any requirement of its permit or operate except in compliance with it (section 502(a)).

Title V also requires that EPA stand ready to issue Federal operating permits when States default in their duty to develop and administer part 70 programs. Section 502(b) of the Act requires that EPA promulgate regulations setting forth provisions under which States will develop operating permits programs and submit them to EPA for approval. Pursuant to this section, EPA promulgated 40 CFR part 70 on July 21, 1992 (57 FR 32250), which specifies the minimum elements of State operating permits programs.

The operating permits program's potential consequences for air pollution control and for sources' ability to meet changing market demands have made the process of developing and implementing the program complex and controversial. Indeed, nearly 20 entities, including State and local

governments, environmental groups, and industry associations, petitioned for judicial review of the part 70 regulations. Subsequently, EPA decided to propose revisions to part 70. See 59 FR 44460 (Aug. 29, 1994). In light of ongoing discussions with petitioners, EPA may propose additional revisions to part 70 in the future that may also necessitate supplementing the part 71 provisions proposed today.

Sections 502(d)(3) and 502(i)(4) of the Act require EPA to promulgate a Federal operating permits program when a State has defaulted on its obligation to submit an approvable program within the timeframe set by title V or on its obligation to adequately administer and enforce an approved program. The rule proposed in this action would establish a national template for a Federal operating permits program that EPA may administer and enforce in a State. In addition, the proposed rule would establish the procedures for issuing Federal permits to sources for which States do not have jurisdiction (i.e., OCS sources outside of State jurisdictions and sources located in Tribal areas). Finally, the proposed rule would establish the procedures used when EPA must take action on a permit that has been proposed or issued by a State or local agency or Indian Tribe having an approved part 70 program and that EPA determines is not in compliance with the applicable requirements of the Act.

In the preamble to the proposed part 70 rule published on May 10, 1991 (56 FR 21712), EPA explained its approach to

developing a Federal operating permits program. The public was encouraged to comment on a number of issues relevant to part 71, such as the contents of Federal permit application forms, permit fees, and public participation. None of the concepts discussed in the proposal for part 71 implementation generated public comment. Although the part 70 proposal made a few assumptions about part 71 that proved to be incorrect, EPA has generally developed this proposed rule in accord with the concepts described in the part 70 proposal.

The EPA believes that part 71 programs should meet the statutory criteria that apply to State programs under title V. Consequently, there are many provisions in the proposed part 71 that are virtually identical to provisions in part 70 and the proposed revisions to part 70. Differences between part 70 and part 71 are noted in the discussion of each section of the proposed rule. Where possible and appropriate, provisions of part 71 are consistent with part 70. Some of the differences between the provisions of part 71 and part 70 reflect the fact that part 71 programs are expected to be of limited duration. The EPA expects that States (and many Tribes) will revise their programs so that they become approvable, and responsibility for the permits program will be transferred back to the State or Tribe.

The primary purpose of the proposed rule is to provide the mechanism by which EPA can assume responsibility to issue permits in situations where the State, local, or

Tribal agency has not developed, administered, or enforced an acceptable permits program or has not issued permits that comply with the applicable requirements of the Act. Secondarily, the proposed rule provides for delegation of certain duties that may provide for a smoother program transition when State programs are approved. For both of these reasons, the proposed rule should strengthen implementation of the Act and enhance air quality planning and control.

Additional benefits of the proposed rule are much the same as those of the part 70 State operating permits rule. For example, permits issued under part 71 will clarify which requirements apply to a source. This clarification should enhance compliance with the requirements of the Act. The part 71 program will enable the sources, EPA, and the public to better understand the requirements to which the source is subject and whether the source is meeting those requirements. Part 71 permits also provide the vehicle for implementing air toxics programs under section 112.

II. Proposal Summary

As explained below, for purposes of proposed part 71, EPA intends to generally follow the approach taken in 40 CFR part 70, including the recently proposed revisions to part 70. The EPA believes this approach is sound for several reasons. First, EPA notes that title V requires EPA to promulgate regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency (section 502(b)). The EPA fulfilled this

responsibility in promulgating part 70. The Act defines "air pollution control agency" to not include EPA, but rather State, local government, and Tribal agencies (section 302(b)). Thus, title V does not explicitly require that the minimum elements of State permit programs must be present in an EPA promulgated and administered title V program. Nevertheless, EPA believes that the Act implicitly requires part 71 programs to be at least as stringent as that required by part 70, as the latter represents the minimum program that is required under title V. It would be counter-intuitive for a Federal permit program under title V to be less stringent than one that EPA believes is necessary to obtain title V approval, especially since the Federal permit program duty arises where States have failed to obtain approval of a part 70 program or are no longer adequately implementing approved programs.

Second, part 71 programs are generally intended to be programs of limited duration, implemented until such time as the State gains approval of its part 70 program. The EPA expects that similarities between proposed part 71 and part 70 requirements will ease program transition from EPA to States. Where States have taken delegation of a part 71 program, State personnel would be familiar with the procedural requirements of the Federal program and would understand quickly where an application is in the permitting process and where the State effort needs to pick up issuance responsibilities. Also, even where the State did not take delegation of a part 71 program, the State could in some

cases take advantage of the processing that EPA has already undertaken on an application. For example, a State agency would generally be able to commence processing a permit revision application previously submitted to EPA without repeating EPA's determination of what revision track was applicable.

Third, establishing similar procedures would ease the burdens on industry when part 71 programs are implemented. For example, the consistency between proposed § 71.7 and its counterpart in part 70 (as proposed to be revised) would provide a constant set of rules for the regulated community to follow. Industry should be generally aware of the requirements of part 70. To the extent they are making production and operation decisions impacted by current and proposed part 70 requirements, compliance with proposed § 71.7 should add no significant additional factors. The same benefit would be present if an approved program is replaced by a part 71 program due to inadequate implementation.

Fourth, following part 70 procedures in part 71 programs would facilitate meaningful affected State and public participation in part 71 permitting actions, as commenting affected States and citizens would not have to become familiar with substantially different procedures when program administration shifts from a Federal permitting authority to a State permitting authority, or vice versa.

Finally, for those sources over which States do not have jurisdiction (certain OCS sources and sources located

in Tribal areas), EPA believes that industry should have an even playing field, with procedures that are consistent with State permits program requirements.

The comment period for the proposed revisions to part 70 will end prior to the comment period for today's rulemaking proposal. It would therefore be of limited value for commenters to suggest in response to today's rulemaking proposal their concerns with those aspects of the part 70 proposed revisions on which proposed part 71 is based. Rather, EPA solicits comments on whether there are any provisions in proposed part 71 for which EPA has inappropriately proposed consistency with part 70 or its proposed revisions or has inappropriately departed from part 70 or its proposed revisions.

A. Section 71.1 - Program Overview

This section introduces the scope of the Federal operating permits regulations and provides that all sources subject to part 71 must obtain an operating permit issued pursuant to the procedures of this part. Consistent with part 70, proposed § 71.1(c) specifies that the requirements of this part shall apply to the permitting of affected sources under the acid rain program of title IV of the Act. However, where title IV or regulations promulgated under title IV provide for different requirements than this part, such provisions shall supersede the provisions of part 71. Likewise, proposed § 71.1(d) clarifies that the issuance of operating permits may be coordinated with issuance of permits under the Resource Conservation and Recovery Act

(RCRA) and the Clean Water Act, whether those other permits are issued by a State, EPA, or the U.S. Army Corps of Engineers. The EPA does not believe that the status of a part 71 program as a federally-administered program would require any different treatment in these respects than would result under a part 70 program.

Section 71.1(e) clarifies that the proposed regulations would not prevent States from developing and administering operating permit programs which contain standards or procedures which are more stringent than contained in this part.

B. Section 71.2 - Definitions

Many definitions of terms used in other parts of the Act or EPA regulations, particularly 40 CFR part 70, are utilized in part 71. However, some of the terms defined in part 70 have been defined differently for use in this part. In addition, a number of new terms were created in conjunction with developing the part 71 regulations. These new definitions include terms necessary to communicate effectively the new regulatory requirements. Section III.A of this preamble discusses the altered and new definitions in detail.

C. Section 71.3 - Sources Subject to Permitting Requirements

As provided in section 502(a) of the Act, stationary sources are subject to the permitting requirements of this part if they are in source categories regulated under sections 111 or 112 of the Act; major stationary sources as

defined under sections 302(j) or 112, or parts C or D of title I of the Act; affected sources under the acid rain provisions of title IV of the Act; or any other source designated by EPA. However, section 112(r)(7)(F) of the Act provides that sources that are subject solely to the regulations or requirements under section 112(r) of the Act are not required to obtain a permit under this part.

Title V authorizes EPA to exempt one or more source categories (in whole or in part) from the requirement to have a permit if the Agency determines that compliance with the part 71 regulations would be "impracticable, infeasible, or unnecessarily burdensome" (section 502(a)). The EPA may not, however, exempt any major source or affected (i.e., acid rain) source.

For purposes of part 71, EPA proposes to follow the same approach in deferring nonmajor sources from review as was followed under part 70 of this chapter. This will result in consistent treatment for such sources among programs administered by States and programs administered by EPA.

The EPA also proposes to follow the approach of part 70 of this chapter by permanently exempting from the permitting requirement those nonmajor sources and source categories that would be subject to title V solely because they are subject to the new source performance standards (NSPS) for new residential wood heaters or the national emission standards for hazardous air pollutants (NESHAP) for asbestos from demolition and renovation activities.

For purposes of part 71, the sections of the rule addressing the requirements for emission units and fugitive emissions at title V sources, which correspond to §§ 70.3(c) and 70.3(d) in the part 70 regulations, would be located in part 71 at proposed §§ 71.6(a)(iv) and 71.5(f)(3)(i), respectively. These sections were moved because, rather than addressing applicability concerns, these provisions identify the type of information that must be included in a permit or permit application once applicability has been determined.

D. Section 71.4 - Program Implementation

Section 71.4 of the proposed rule summarizes the circumstances under which EPA would implement a part 71 program and would issue permits using procedures of this part. The EPA would administer a part 71 program for those portions of a State that lack approved part 70 programs if the State fails to gain EPA approval in whole for its operating permits program in accordance with statutory deadlines or if the State fails to adequately administer and enforce an approved program.

The EPA will also administer part 71 programs for areas within the exterior boundaries of an Indian reservation for a federally recognized Indian Tribe or any other area within the jurisdiction of such Indian Tribes.[1] The EPA plans to

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[1]All references in this notice to Indian Tribe mean "any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (section 302(r)) The

administer programs on some Tribal lands in order to protect the air quality of those areas. Prior to implementing a Federal permits program, EPA will work with Tribes in developing their own operating permits programs, assuming Tribes are granted such authority. See 59 FR 43956 (Aug. 25, 1994).

Section 71.4 of the proposed rule also establishes procedures that would be used when EPA must take action on an objectionable permit that has been proposed or issued by a permitting authority pursuant to an EPA-approved operating permits program and procedures that would be used in conjunction with part 55 for issuing permits to certain sources located on the OCS.

E. Section 71.5 - Permit Applications

Each source meeting the applicability criteria of this part would be required to submit timely and complete information on standard application forms provided by the permitting authority. The permitting authority may provide streamlined forms for the submittal of applications for general permits and may provide for submittal of certain forms in electronic formats.

A source applying for a part 71 permit for the first time would be required to submit a permit application within 12 months of the later of:

U.S. Department of Interior periodically publishes a list of Federally recognized Tribes in the Federal Register. See 58 FR 54364 (Oct. 21, 1993).

(1) The effective date of this part in a State, Tribal area, or OCS area where a source is located, unless the source has an existing part 70 permit;

(2) The expiration of any deferral for a nonmajor source granted pursuant to proposed § 71.3(b)(1), unless the source has an existing part 70 permit;

(3) The date a source commences operation; or

(4) The date a source meets any of the applicability criteria of proposed § 71.3.

Sources with part 70 permits in force on the effective date of a part 71 program for a specific area would not be required by this proposal to submit permit applications addressing the entire facility until their part 70 permits expire. Proposed § 71.4(k) states that "the Administrator will modify part 70 permits using the procedures of part 71." Therefore, sources with part 70 permits in force at the time part 71 becomes effective in the area where they are located would not have to apply for a part 71 permit until their part 70 permit expires. Prior to its expiration, the part 70 permit may be modified by EPA using the procedures of proposed §§ 71.7 and 71.11.

As provided in proposed § 71.5(b)(1), the Administrator may specify a date earlier than 12 months after a source becomes subject to part 71, for the submission of a source's application. Sources would be notified of the requirement to submit an application at least 120 days prior to when the application is due.

Proposed § 71.5(c) provides that the permitting authority will perform a completeness determination within 60 days of receipt of an application, or the application will be deemed complete by default. A complete application would be one that the permitting authority has determined contains all the information needed to begin processing the permit application. The basis for determining the completeness of applications cannot be described specifically within this proposed rule for all types of sources or source categories because the specific information that constitutes a complete application is a function of the type of source, the pollutants emitted, and the applicable requirements, among other factors. Additional guidance on what would constitute a complete application can be derived from the contents of the standard application form itself and any accompanying instructions.

Section 71.5(g) proposes certain exemptions from the application content requirements of proposed § 71.5(f) for insignificant activities and emission levels. These exemptions could not be used if information concerning the activities or emissions levels would otherwise be needed to determine the applicability of or to impose any applicable requirement, to determine whether the source is major, to determine whether a source is subject to the requirement to obtain a part 71 permit, or to calculate the fee amount required under the schedule established pursuant to proposed § 71.9.

Applicants would be required to update information in the application after the filing date and prior to the release of the draft permit. For example, information that is missing, is incorrect, or addresses applicable requirements that become applicable after the filing date would have to be reported when the applicant becomes aware of the problem.

Proposed § 71.5(i) would require that each operating permit application, report, or compliance certification submitted pursuant to part 71 include a certification signed by a responsible official attesting to the truth, accuracy, and completeness of the information submitted.

F. Section 71.6 - Permit Content

Permit content requirements, located in several parts of title V, are consolidated in proposed § 71.6. For the most part, the requirements proposed in proposed § 71.6 follow those found in the corresponding section of 40 CFR part 70 and the recently proposed revisions to part 70.

1. Standard Permit Conditions

A part 71 permit would typically contain certain core elements: an introductory section providing the source's name, address, key contacts, and various standardized conditions; a description of the source and its processes and emissions; and a statement of the applicable regulatory requirements, including monitoring, recordkeeping, and reporting.

Proposed § 71.6(a) describes standard permit conditions that would apply to each part 71 permit. One of the key

proposed requirements of the section is that each permit include emission limitations and standards, including those operational requirements and limitations that assure that the source complies with all applicable requirements at the time of permit issuance. Proposed § 71.6(a)(1)(i) would require that the permit specify the basis or citation of each of these requirements (e.g., a reference to the Federal regulation that contains the applicable NSPS). This will reduce confusion regarding the origin of any limitation standard, or other condition, and ensure that EPA, the source, and the general public agree on the applicable regulatory requirements.

As per proposed §§ 71.6(a)(2)-(9), the permit would also be required to contain various other provisions that are important to permit management. For example, the permit would have to contain information regarding the permit's duration; any allowances under title IV; general provisions regarding severability of the permit terms; provisions regarding enforceability; and provisions regarding modification, revocation, reopening, reissuance, or termination. The permit would also have to include provisions to ensure payment of fees and describe any economic or market incentives or emissions trading to which the source is subject. The permit would also include all requirements that become applicable at a future date.

2. Compliance Monitoring Requirements

Section 504 requires that permits contain terms sufficient to assure compliance with all terms of the permit

(e.g., emission limits). Proposed §§ 71.6(c)-(j) would implement this requirement by establishing testing, monitoring, recordkeeping, reporting, and compliance certification requirements.

The term "monitoring" refers to many different types of data collection and analysis. The responsibility to monitor compliance rests with the source. The permit must contain a method to periodically monitor compliance. For example, the permit could require ambient air monitoring, measurements of various parameters of process or control devices (e.g., temperature, pressure drops, voltages), periodic stack sampling, or continuous emission or opacity monitoring. Monitoring may, in appropriate circumstances, consist of recordkeeping. Monitoring, recordkeeping, and reporting provisions are essential to ensure that standards are directly enforceable as a practical matter.

Section 504(a) and proposed § 71.6(f)(2) require permittees to submit the results of all required monitoring at least every 6 months. These reports would have to be certified for truth, accuracy, and completeness by a responsible official. The data would have to be submitted in a format consistent with the underlying standard. For example, if the emission limitation for a coating facility is 2.9 pounds of volatile organic compounds (VOC) per gallon of coating, the information must be presented in terms of pounds of VOC per gallon in the monitoring report. Enforcement personnel should not have to do any calculations

or conversions of raw monitoring data to the applicable standard to be able to determine compliance.

Certifications of compliance are required by both title V and section 114 of the Act. Section 504 specifies that each permit must contain compliance certification requirements, and section 114 further requires submission of compliance certifications for all major stationary sources, and other sources as specified by the Administrator. As provided in proposed § 71.6(g), certifications would be required at least annually, and at a minimum would have to include: (1) the source's compliance status at the time of report preparation; (2) a statement whether compliance was continuous or intermittent during the reporting period; (3) the method used as the basis for certifying compliance, which includes, but is not limited to, any enhanced monitoring protocol required by section 114 and any periodic monitoring data; (4) any deviations and periods of noncompliance; (5) reasons for the noncompliance; (6) how the noncompliance was corrected; and (7) how it will be prevented in the future. Also, the certified report would be required to identify periods of missing data and the cause for the missing data. Certifications and all reports would have to be signed by a responsible official who would be required to certify their truth, accuracy, and completeness based on reasonable inquiry, information, and belief. The EPA would evaluate these certifications to determine if further inspection or enforcement activity is warranted.

A compliance certification would have to be submitted for each emission standard, work practice, or operating restriction. However, it would not be necessary to submit separate reports. One report certifying all the contents therein would suffice.

Sources that were not in compliance at the time of permit issuance would be required to submit progress reports consistent with an applicable schedule of compliance and proposed § 71.5(f)(9). Proposed § 71.6(j) provides that progress reports would have to be submitted at least semiannually, but could be required more frequently by the permitting authority.

The EPA reserves the right to pursue enforcement of applicable requirements notwithstanding the existence of a compliance schedule in a permit to operate. This is consistent with 40 CFR 70.5(c)(8)(iii)(C) and proposed § 71.5(f)(9)(iii)(C), which state that a schedule of compliance shall not sanction noncompliance with the applicable requirements on which it is based.

3. Permit Shield

Like part 70, part 71 would allow sources to apply for a permit shield, i.e., a provision in the permit that states that if the source complies with the terms and conditions of the permit, the source shall be deemed in compliance with any applicable requirements reflected in the permit as of the date of permit issuance. The shield would provide sources protection against enforcement actions based on violations of applicable requirements that were not included

in the permit and specified in the permit as not being applicable to the source. Proposed § 71.6(n) describes what the permit would have to contain in order to create a shield.

4. Acid Rain Requirements

Acid rain sources will be issued permits that contain the standard permit terms discussed above (except where superseded by requirements of the acid rain program) as well as provisions required by title IV and 40 CFR parts 72 through 78. Specifically, all permits issued to affected sources under the acid rain program shall prohibit: (1) annual emissions of nitrogen oxides (NO_X) by certain affected units in excess of the applicable emissions limitation for NO_X; (2) annual emissions of sulfur dioxide (SO_2) by affected units in excess of the number of allowances to emit SO_2 held by each such affected unit for use in that year; (3) any person from holding, using, or transferring any acid rain allowance, except in accordance with regulations at part 73 of this chapter; (4) the use of any allowance prior to the calendar year for which it was allocated; and (5) contravention of any other provision of title IV or the Act.

5. Applicable Requirements of the Act and the SIP

Title V requires that operating permits assure compliance with each applicable standard, regulation, or requirement under the Act, including the applicable implementation plan (sections 502(b)(5)(A), 504(a), and 505(b)(1) of the Act). The EPA interprets "applicable

requirements" of the Act and the SIP to mean limitations, standards, and/or requirements directly applicable to sources.

Generally, EPA would not deny a permit that otherwise complies with the applicable SIP on the grounds that it does not assure attainment of the national ambient air quality standards (NAAQS). Where more than one source substantially contributes to the NAAQS violation, EPA would not use individual permit actions to impose limits on sources beyond those required in a SIP. It is the State's responsibility to decide what limits the SIP should impose on the various sources in order to assure attainment of the NAAQS. The EPA must review these planning decisions when the Administrator, as required by the Act, updates the attainment demonstration or incorporates individual permit limits into the SIP. The EPA emphasizes that, for the preceding case to be grounds for potential permit denial, the relationship between the single source's emissions and the NAAQS violation must be direct and clear.

When a State fails to submit or implement a SIP, EPA may have to impose a FIP under section 110(c) of the Act. When a FIP applies to an area, operating permits for sources in that area must assure compliance with the FIP measures. Moreover, the requirement under title V that operating permits programs assure compliance with all applicable requirements under the Act includes the requirements imposed in any new source review (NSR) permit. Any requirements established during the preconstruction review process,

including an NSR program, also apply to the source for purposes of implementing title V.

6. Operational Flexibility

A permitted source would be able to make certain changes without obtaining a permit revision, if the changes are not modifications under any provision of title I of the Act and do not exceed the emissions allowable under the permit. As provided in the recently proposed revisions to part 70, such operational flexibility changes could take the form of trading under a federally-enforceable emissions cap in the permit, or trading under the applicable SIP or FIP. Moreover, as under part 70, sources could request alternative operating scenarios in their permits, allowing them to switch between scenarios without seeking permit revisions. Proposed part 71 would also allow certain changes to remain "off-permit" for a six month period.

G. Section 71.7 - Permit Review, Issuance, Renewal, Reopenings, and Revisions

Proposed § 71.7 sets forth EPA's proposed regulations for permit issuance, renewal, reopenings, and revisions. In general, proposed § 71.7 follows the provisions of 40 CFR 70.7, as recently proposed to be revised. See 59 FR 44460 (Aug. 29, 1994). Where proposed § 71.7 follows part 70 and the proposal revisions thereto, today's proposal incorporates by reference the rationale. For example, where appropriate, EPA intends in part 71 to mirror the four-track permit revision process contained in the recently proposed revisions to part 70. Certain aspects of the four-track

system, however, would not be available under part 71 programs in all cases. These differences are discussed in detail later in this preamble. After comment is taken on the four-track process as part of the part 70 rulemaking and the permit revision procedures of part 70 are promulgated, EPA expects to use the same procedures in part 71, as appropriate. The EPA solicits comments on whether there are any provisions in proposed § 71.7 for which EPA has inappropriately proposed consistency with part 70 or that inappropriately depart from part 70 or its proposed revisions.

1. Action on Applications for Permit Issuance and Permit Renewal

Proposed § 71.7(a) describes the conditions that would have to be satisfied before EPA or a delegate agency may issue a permit. These include receipt of a complete application, compliance with public participation requirements, and notification of affected States. Also, when the program has been delegated pursuant to proposed § 71.10, the delegate agency would be required to comply with requirements to provide notice to EPA. Except during the initial phase-in of the program, the permitting authority would be required by proposed § 71.7(a)(2) to act on permit applications within 18 months after receiving a complete application (12 months in the case of early reductions demonstrations under section 112(i)(5) of the Act).

Proposed § 71.7(a)(3) would establish a deadline by which the permitting authority must determine whether a permit application is complete, and also would allow the permitting authority to commence certain permit revisions without doing a completeness determination.

In general, permits would have to contain all applicable requirements. However, as provided in proposed § 71.7(a)(6), if a new applicable requirement becomes applicable to a source after issuance of a draft permit, the permit could be issued without incorporating the new requirement, provided the permitting authority institutes proceedings to reopen the permit and the permit contains a statement that it is being reopened for this purpose.

Pursuant to section 503(d), proposed § 71.7(b) provides that the timely submittal of a complete application and the timely submittal of any additional information would create a "shield" against enforcement for failure to have a part 70 or part 71 permit. Permits being renewed would be subject to the same procedural requirements that apply to initial permit issuance, as provided in proposed § 71.7(c).

2. Permit Revisions

As described in proposed §§ 71.7(d)-(h), for permit revisions EPA is proposing a four-track system that matches the amount of provided public process to the potential environmental significance of the change, taking into account the amount of prior public review. Only the most significant changes that had received little or no prior public review would be processed as significant permit

revisions requiring a 30-day public comment period and an opportunity for a public hearing before the source could operate the change. The large majority of changes requiring permit revision would be processed using one of the three more streamlined tracks (administrative amendment, de minimis permit revision, and minor permit revision), with the choice of track depending primarily on the size of the change and the amount of public process the change received prior to the part 71 process. To the extent a change was subjected to public review prior to the part 71 process (e.g., as a result of preconstruction review), it would receive abbreviated or no additional public review during the part 71 process. To the extent a change was small in terms of emissions impact, even if no prior public review was provided, it would receive only post hoc public review during the part 71 process. In addition, the permit shield would be available for many of the changes that undergo streamlined processing. Also, the proposed revision procedures would allow use of the more streamlined tracks for incorporating section 112 requirements into permits in most cases.

3. Reopening for Cause

Proposed § 71.7(i)(1)(i) would require that permits issued to major sources with 3 or more years remaining in the permit's term be reopened to incorporate applicable requirements which are promulgated after the issuance of the permit. Revisions would have to be made as expeditiously as practicable, but no later than 18 months after the

promulgation of such additional requirements.Proposed §§ 71.7(i)(1)(ii)-(iv) require that permits be reopened when additional requirements become applicable to an affected source under the acid rain program, when the permitting authority determines that the permit contains a material mistake, or when the permitting authority determines that the permit must be revised or revoked to assure compliance with applicable requirements.

Proposed § 71.7(i)(2) would require that proceedings to reopen and reissue a permit follow the same procedures as apply to initial issuance except where the permit is reopened to incorporate a MACT standard. In the case where a section 112 standard is promulgated after permit issuance, administrative amendment procedures may be used to incorporate the standard; generally, the permit would be subsequently revised to identify compliance requirements. In the case where a section 112 standard is promulgated before permit issuance (and where a compliance statement is due after permit issuance), the source will apply for a minor permit revision by the compliance statement deadline (to incorporate the compliance requirements in the permit).

Proposed § 71.7(i)(3) states that permit reopenings could not be initiated before a notice is provided to the part 70 or part 71 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened (except in case of emergency, and for some section 112 standards).

Proposed § 71.7(j) provides that if EPA finds that cause exists to terminate, modify, or revoke and reissue a permit (in the case of programs delegated pursuant to proposed § 71.10), then EPA would take such action, should the delegate agency fail to take appropriate action.

4. Alternative Proposal for Addressing Monitoring Changes

In the recent proposal to revise 40 CFR part 70, EPA solicited public comment on a variation on the revision tracks that would provide for more flexible treatment of changes to compliance monitoring permit terms. In order to remain consistent with the proposed revisions to part 70, it is presented separately in this proposed part 71 as well.

The proposed permit revision tracks discussed above in section II.G.2 of this preamble should thus be viewed as representing one approach to changes in compliance monitoring terms; this section of the preamble presents another.

Without the proposed monitoring option, the proposed four-track permit revision system would allow changes in monitoring requirements to the extent they are necessary to implement the operational change. For example, a permit change for the addition of a new unit would incorporate any new monitoring requirements that apply to the change. If existing monitoring terms in the permit no longer apply as a result of the change, they would be deleted.

However, the proposed stipulation in § 71.7(h)(1) that "every significant change in existing monitoring permit

terms or conditions" is to be considered a significant change would still prohibit most monitoring changes from being made.

The alternative monitoring proposal would alter the eligibility criteria of the administrative amendment, de minimis and minor permit revision tracks as necessary to allow certain monitoring changes to use fast-track procedures. The alternative proposal would allow fast-track processing of changes to monitoring (including recordkeeping) requirements in the permit within the scope of underlying applicable requirements.

H. Section 71.8 - Affected State Review

The provisions in proposed § 71.8 would essentially track the provisions of 40 CFR 70.8(b) implementing section 505(a)(2) of the Act. Pursuant to proposed § 71.8, EPA, or the delegate agency in the event that EPA has delegated authority under proposed § 71.10, would be required to provide notice to all affected States (as defined in proposed § 71.2) of each draft permit and addenda to permits that incorporate de minimis permit revisions.

I. Section 71.9 - Permit Fees

Section 71.9 of this proposal would establish the Federal operating permits program fee requirements. The owners or operators of part 71 sources would be required to pay fees to EPA that are sufficient to cover the permits program costs. Federal operating permits program fees would be required irrespective of any applicable State operating permits program fees.

Section 502(b)(3)(C)(i) of the Act provides that fees collected pursuant to this rule may be used solely to cover "the Administrator's costs of administering the provisions of the permit program promulgated by the Administrator." Proposed § 71.9(b) outlines the administrative activities that EPA would consider in determining permit program costs. These activities would be considered in determining costs, whether they are undertaken directly by EPA, a delegate agency, or a contractor.

The fee schedule proposed in § 71.9(c) would establish an annual fee for part 71 sources that is based on a dollar per ton charge on actual emissions of each regulated pollutant (for fee calculation) that is emitted from a source. The dollar per ton fee would vary depending on the implementation mechanism EPA uses to administer a part 71 program. A program that is administered completely by EPA staff would charge $45 per ton per year (ton/yr). A program for which EPA relies on contractor assistance to the greatest extent possible would charge $74 per ton/yr, plus $3 per ton/yr to cover the additional administrative costs of implementing a contracted program. The cost of a program that is staffed in part by EPA employees and in part by contractors would vary in accordance with the percentage of personnel time allocated to contractors and would include the $3 per ton/yr surcharge. A program that EPA delegates or partially delegates to a State would charge $45 per ton/yr, plus $3 per ton/yr to cover the additional administrative costs of implementing a delegated program. A

program that EPA partially delegates to a State and partially contracts to a private firm would charge an emissions fee in accordance with the formula in proposed § 71.9(c)(3). In that case, EPA's and the State's percentage of effort would be aggregated for purposes of the formula. Under a delegated or partially delegated program, EPA would be responsible for collecting fees.

Proposed § 71.9(c)(7) provides that EPA may promulgate a separate fee schedule for a particular part 71 program if the Administrator determines that the fee schedule in this rule does not adequately reflect the costs of administering that program.

J. Section 71.10 - Delegation of Part 71 Program

Proposed § 71.10 would establish the procedures EPA would follow when delegating the authority to administer a part 71 program to a State, eligible Indian Tribe, or other air pollution control agency.

As provided in proposed § 71.10(a), EPA and the delegate agency would enter into a "delegation of authority agreement" that sets forth the terms and conditions of the delegation.

As part of its oversight of delegated programs, EPA would review copies of applications, compliance plans, proposed permits and final permits that the delegate agency would be required to send to EPA, as proposed in § 71.10(d). The EPA would have 45 days in which to review proposed permits. If EPA objects to the issuance of a permit within that time, the delegate agency would be required to revise

and resubmit the proposed permit to EPA. If EPA does not object, members of the public could petition EPA to object to the permit as provided in proposed § 71.10(h).

Delegation of a part 71 program would not relieve a State of its obligation to submit an approvable part 70 program, nor from any sanctions that the Administrator may apply for the State's failure to have an approved part 70 program.

K. Section 71.11 - Administrative Record, Public Participation, and Administrative Review

Section 71.11 of the proposed rule would provide detailed procedural requirements for public participation in and administrative review of permitting decisions. While the part 70 rule establishes minimum requirements for public participation in State administered programs, EPA believes that because the part 71 program will be federally administered and not subject to further rulemaking before the program is in effect, specific procedures for public participation and administrative review should be established concurrently with the other requirements of this rule. This approach is consistent with other federally-administered permitting programs, such as the Prevention of Significant Deterioration (PSD), National Pollutant Discharge Elimination System (NPDES), and RCRA programs.

L. Section 71.12 - Prohibited Acts

It is important to note that it is unnecessary to include an enforcement authority section in the part 71 Federal program regulations that specifically corresponds to

the enforcement authority section in the part 70 State program regulations. Rather, because the program under part 71 is a Federal program, it will be enforced through the full Federal enforcement authorities in the Act.

Examples of the Federal enforcement authorities available under the Act for violations of title V and the regulations thereunder include, but are not limited to, the authority to: (1) restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of the Act that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment; (2) seek injunctive relief in court to enjoin any violation of the Act; (3) issue an administrative order against any person assessing a civil administrative penalty of up to $25,000 per day for each violation of the Act; and (4) assess and recover a civil penalty of not more than $25,000 per day for each violation of the Act. Another example of enforcement authority available under the Act is the authority to assess criminal fines pursuant to title 18 of the United States Code or imprisonment for not to exceed 5 years, or both, against any person who knowingly violates title V and the regulations thereunder. The above list is not an exhaustive description of the Federal enforcement authority available under the Act for violations of title V and the regulations thereunder. Accordingly, nothing in this discussion shall be construed to limit the Federal

enforcement authorities available under the Act for violations of title V and the regulations thereunder.

The Federal enforcement authority available under the Act for violations of title V and the regulations thereunder provides broader enforcement authority than the States are required to have under the part 70 regulations. For example, 40 CFR 70.11 requires that States have authority to recover civil penalties for a maximum amount of not less than $10,000 per day per violation. The Federal enforcement authority imposes a maximum penalty of up to $25,000 per day per violation.

III. Detailed Discussion of Key Aspects of the Proposed Regulations

A. Section 71.2 - Definitions

Generally, the proposed definitions in part 71 would follow the definitions in currently promulgated part 70 and its proposed revisions, as appropriate. However, some of the definitions used in 40 CFR part 70 would be modified for use in this part. The key part 71 definitions (including some which would be defined differently than in part 70) are discussed in this section. Others are discussed in the preamble sections describing the program areas where they are primarily used. Still others are defined in other titles of the Act and the regulations promulgated thereunder.

1. Affected State

The definition of "affected State" for purposes of proposed § 71.8 would include lands within the exterior

boundaries of an Indian reservation or other areas over which an Indian Tribe has jurisdiction (hereafter "Tribal area"). If EPA administers a part 71 program for such an area, EPA would consider the Indian Tribe to be an affected State and would provide the Tribe notice of draft permits, permit renewals, permit reopenings, and permit revisions. Such notice would also be provided when a part 71 program is implemented outside of a Tribal area and an applicant source is within 50 miles of the Tribal area, or is in an area that is contiguous to the Tribal area and may affect the air quality in that area, provided the Indian Tribe meets the eligibility criteria for being treated in the same manner as a State for programs under the Act. See 59 FR 43956 (Aug. 25, 1994).

The definition of "affected State" for purposes of proposed § 71.8 would also include the State or Tribal area and the area within the jurisdiction of the air pollution control agency in which the part 71 permit, permit revision, or permit renewal is being proposed. EPA believes this provision is necessary for part 71, while not for part 70. In some cases under a part 71 program, the title V permitting authority (EPA) would not be the same as the governmental body with general jurisdiction over the area (i.e., the State, Tribe, or local air pollution control agency). When EPA is the permitting authority, EPA believes it is necessary to notify the States, Tribal authorities, and local agencies with jurisdiction over the areas in which EPA's action is proposed. Otherwise, these authorities

would be less apprised of EPA's actions than the neighboring areas that do not have jurisdiction over these areas and are less likely to be impacted by EPA's actions. The EPA solicits comment on this expansion of the term "affected State," and on whether other mechanisms might adequately serve to apprise "host" jurisdictions of EPA part 71 actions.

2. Applicable Requirements

An "applicable requirement" is any standard or other requirement that applies to a source. This includes any relevant requirement in an approved SIP or preconstruction permit. It also includes any pertinent standard or other requirement imposed pursuant to any title of the Act, such as sections 111, 112, 114(a)(3), 129, 183(e), 183(f), 328, 504(b), 504(e), 608, or 609. However, EPA does not believe that the provisions of sections 604 through 606 and 610 through 612 of title VI of the Act must be considered as applicable requirements for title V and included in title V permits. The rationale for this determination can be found in the preamble to the proposed revision of the part 70 regulations, at IV.A.1(b). See 59 FR 44460 (Aug. 29, 1994).

For purposes of part 71, EPA today incorporates that rationale by reference. The EPA also incorporates by reference that notice's rationale for adding to the list of applicable requirements any requirements that create offsets or limit emissions for the purpose of complying with, or avoiding applicable requirements. The proposed addition to the part 70 list and today's proposal for part 71 would add

as an applicable requirement any emissions-limiting requirement that is enforceable by citizens or EPA under the Act and that is placed on a source for purposes of creating an offset credit or avoiding the applicability of applicable requirements.

3. Tribal Areas

The EPA has published a proposed rule, pursuant to section 301(d)(2), specifying the provisions of the Act for which EPA believes it is appropriate to treat Indian Tribes in the same manner as States. See 59 FR 43956 (Aug. 25, 1994) ("Indian Tribes: Air Quality Planning and Management," hereafter "proposed Tribal rule"). The proposed Tribal rule also addresses the criteria a Tribe must meet in order to be eligible for treatment in the same manner as a State for the specified provisions of the Act.

For a Tribe to be eligible for treatment in the same manner as a State, it must be Federally recognized (section 302(r)) and must meet the three criteria set forth in section 301(d)(2)(A)-(C). Briefly, these criteria consist of the following: (1) the Tribe must have a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Tribe must pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the Tribe's jurisdiction; and (3) the Tribe must be capable of carrying out the functions to be exercised consistent with the terms and purposes of the Act and applicable regulations. These criteria and EPA's

streamlined process for determining compliance with these criteria are described in detail in the Tribal rule (59 FR 43961-4).

In the Tribal rule, EPA proposes to interpret the Act as granting, to Tribes approved by EPA to administer programs under the Act in the same manner as States, authority over all air resources within the exterior boundaries of an Indian reservation. This would enable Tribal-approved programs under the Act to address conduct on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation. The proposed Tribal rule would also authorize an eligible Tribe to develop and implement programs under the Act for off-reservation lands that are determined to be within a Tribe's inherent sovereign authority to regulate. The rationale for this proposed interpretation of Tribal jurisdiction under programs under the Act is set out in detail in the proposed Tribal rule, and is incorporated here by reference. See 59 FR 43958-61.

EPA's final interpretation of Tribal jurisdiction under this Act may affect the scope of a part 71 program administered by EPA for Tribes. When, pursuant to Federal implementation authority, EPA is acting in the place of a State or Tribe under the Act, all of the rights and duties that would otherwise fall to the State or Tribe accrue instead to EPA. See Central Arizona Water Conservation Dist. v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993), cert. denied, 114 S.Ct. 94 (1993). Therefore, the scope of Tribal

authority under the Act may inform EPA's authority in administering a part 71 program for Tribes.

More specifically, EPA would have authority to implement a Tribal part 71 program for any lands within the exterior boundaries of a reservation and any off-reservation land over which a Tribe has inherent sovereign authority. Tribes determined eligible to be treated in the same manner as a State under the Act would be given notice under proposed §§ 71.8 and 71.10 of certain permit actions. All land within the exterior boundaries of a reservation and any other lands over which a Tribe has demonstrated inherent authority would be considered in providing notice to a Tribe. Further, the proposed part 71 rules provide that, in all instances, the Tribe for the area in which a part 71 permit program is being administered will receive notice.

The EPA's proposed Tribal rule is subject to public comment and may be modified before it is issued in final form. The EPA may need to make conforming changes to the part 71 rules proposed today to reflect any relevant revisions made to the Tribal rule.

4. Major Source

The EPA is proposing to utilize the same approaches to defining "major source" as were used for 40 CFR parts 63 and 70, except that today's proposal, like the recently proposed revisions to part 70, would change the definition of major source to conform to the definition in section 112(a) of the Act and to implementing regulations governing hazardous air pollutants (HAP) sources recently promulgated in 40 CFR

part 63. Section 501(2) of the Act provides, in relevant part, that the term "major source" means "any stationary source (or any group of stationary sources located within a contiguous area and under common control)" that would be a major source under section 112 or a major stationary source under section 302 or part D of title I of the Act. Other conditions and requirements relevant to the major source definition are:

a. Section 302 and Part D Sources. Except for sources qualifying as support facilities (see paragraph (c) of this section), stationary sources can only be aggregated to determine whether they constitute a major stationary source subject to section 302 or part D of the Act if they are in the same industrial grouping, as determined by their 2-digit code. These codes can be found in the Standard Industrial Classification Manual, 1987.

b. Section 112 Sources. Stationary sources of HAP must be aggregated for the purpose of determining whether they are major sources subject to section 112 without regard to their industrial grouping.

c. Support Facilities. The EPA proposes to include in the definition of a major source pursuant to section 302 or part D of title I of the Act, any facility or emission unit used to support the main activity of the source, regardless of its 2-digit code. A support facility must be located on the same property as the source it supports, or on adjacent property, and be under the control of the same entity.

Also, at least 50 percent of the support facility's output must be dedicated to the source.

d. Emission Requirements. To be major, a stationary source must have the potential to emit pollutants in amounts at or above the major source threshold, which is determined by the type of pollutant emitted and by the attainment status of the area in which the source is located. Thus, the term "major source" encompasses the following:

(1) Air toxics sources with the potential to emit 10 tons per year (tpy) or more of any HAP listed pursuant to section 112(b); 25 tpy or more of any combination of HAP listed pursuant to section 112(b); or a lesser quantity of a given pollutant, if the Administrator so specifies. And, once the Administrator promulgates a definition of major source for radionuclides, a source would be major if it emits, or has the potential to emit, major amounts of radionuclides.

(2) Sources of air pollutants, as defined in section 302 of the Act with the potential to emit 100 tpy or more of any pollutant.

(3) Except as noted in paragraph (d)(4) of this section, sources subject to the nonattainment area provisions of title I, part D, with the potential to emit pollutants in the following, or greater, amounts:

(a) 50 tpy VOC or NO_x in serious ozone nonattainment areas;

(b) 25 tpy VOC or NO_x in severe ozone nonattainment areas;

(c) 10 tpy VOC or NO_X in extreme ozone nonattainment areas;

(d) 50 tpy VOC in ozone transport regions established pursuant to section 189 of the Act;

(e) 50 tpy carbon monoxide (CO) in serious CO nonattainment areas; and

(f) 70 tpy particulate matter (PM-10) in serious particulate matter nonattainment areas.

(4) The NO_X thresholds in paragraph (d)(3) of this section do not apply in nonattainment areas qualifying for an exemption under section 182(f) of the Act. This exemption applies in the case where reducing NO_X emissions would not reduce ozone formation. In those areas, a stationary source of NO_X is not considered a major source under part D of title I of the Act unless its potential to emit is 100 tpy or more. In areas not qualifying for this exemption, NO_X sources are subject to the lower thresholds defined in part D and listed in paragraph (d)(3) of this section. Whatever its location, any 100 tpy source would be considered a major source under section 302 of the Act. Also, the major source threshold for VOC in ozone transport regions in paragraph (d)(3) of this section does not apply for NO_X. This threshold was created by section 184(b) of the Act. Because section 182(f) of the Act (which requires NO_X sources to meet the same thresholds as VOC sources) does not refer to section 184(b) of the Act, the lower threshold for VOC sources in ozone transport regions does not apply to NO_X sources.

e. Fugitive Emissions. The fugitive emissions from a stationary source shall be considered in making the determination as to whether it is a major source when:

(1) The source belongs to one of the source categories listed in the definition of "major stationary source" at 40 CFR parts 51 and 52. These NSR regulations list a number of source categories for which fugitive emissions must be included, to the extent quantifiable, when making a major source determination. It is the intention of EPA to continue the policy of including fugitives for the listed source categories. This list includes source categories regulated by a section 111 or section 112 standard as of August 7, 1980. Thus, sources in categories subject to standards set after August 7, 1980, if not otherwise listed, would be exempted from the requirement to include fugitive emissions when making their major source determination until such time as EPA conducts section 302(j) rulemaking to require that fugitive emissions from those sources be included. It should be noted that this time limitation was deleted from the final part 70 regulations promulgated on July 21, 1992. The correct procedural steps were not followed in making this change, however, so EPA has proposed that part 70 regulations be revised to reinsert the original date.

(2) The air pollutants emitted are HAP or radionuclides. The EPA believes the Act requires that fugitive emissions of HAP or radionuclides, to the extent quantifiable, be counted. Section 112(a)(1) of the Act uses

the term "major source," rather than "major stationary source," and legislative history indicates an intent by Congress to treat this definition differently than the section 302(j) "major stationary source" definition. Moreover, section 112 of the Act establishes a new program with a relatively narrow focus; it applies only for specific HAP at source categories to be determined by EPA. All this suggests that the section 302(j) rulemaking requirement does not apply in the context of section 112, and that fugitive emissions must therefore be included for the purpose of determining whether a source is major under section 112(a)(1).

4. New Source Review

The definitions for major and minor NSR have been included so they can be used to describe the proposed permit revision procedures. In some cases, the action to revise a permit will depend on whether the change was subjected to major or minor NSR before being processed as a part 71 revision.

5. Potential to Emit

In the proposed definition of "potential to emit," limitations on a source's potential to emit would be federally enforceable only if they are enforceable by the Administrator and citizens under the Act. This differs from the definition currently in part 70 of this chapter, in that the part 70 definition only requires that the limitations be enforceable by the Administrator. This proposal would

follow the definition in the proposed revisions to part 70. See 59 FR 44460 (Aug. 29, 1994).

6. Responsible Official

The proposed definition of "responsible official" would allow a person other than the designated representative to be the responsible official for activities not related to acid rain control at affected sources. The nature of the responsibilities of a designated representative (e.g., performing acid rain allowance account transactions) has prompted many owners and operators of affected sources to select corporate personnel, in lieu of site personnel, to act as their designated representatives. Such persons, though, may not be in the best position to handle duties not related to acid rain. This distinction between responsible official and designated representative would allow sources to designate the appropriate individual to carry out each responsibility. Procedurally, the designated representative would still be responsible for signing all documents relating to acid rain (e.g., the acid rain permit applications and revision requests) and would be authorized to submit them directly to the permitting authority for action without the consent of the nonacid rain responsible official. Similarly, the nonacid rain responsible official may carry out responsibilities not related to the acid rain program without the consent of the designated representative.

7. Title I Modification

The definition "title I modification" or "modification under any provision of title I of the Act" has been included in this proposed regulation to clarify that changes to be treated as title I modifications include those processed through minor NSR procedures, as well as section 112 changes and major NSR modifications. Considerable confusion and controversy has surrounded the interpretation of this definition. It stems from EPA's failure to state explicitly, in the current 40 CFR part 70 regulations (July 21, 1992), that the term "modification under any provision of title I" includes minor NSR changes. For example, in footnote 6 of the preamble to the proposed part 70 rule (56 FR 21712, 21746-7 (May 10, 1991)), EPA neglected to mention section 110(a)(2)(C) of the Act, which requires States to regulate the "modification" (and construction) of stationary sources as necessary to assure that national air quality standards are met.

Virtually every State currently administers a minor NSR program. Under section 110, these State programs must be included in SIP's, and thus are integral parts of the Federal-State program for controlling air pollution under the Act. Since 1977, when Congress established a separate and much more stringent NSR program for "major" new and modified sources (see parts C and D of title I of the Act), minor NSR programs have taken on the additional important function of providing a means for sources to avoid major NSR requirements.

Because minor NSR programs approved into SIP's establish federally-enforceable emissions limits, minor NSR permits have become the vehicle of choice for creating "synthetic minor new sources" and "synthetic minor modifications." Thus, the integrity of major NSR programs is linked to the integrity of the minor NSR programs. Underscoring the importance of both programs is the regulatory requirement that State or local permitting authorities provide an opportunity for public participation in major and minor NSR permitting (40 CFR 51.160, 161, 165, and 166). The EPA therefore believes that the terms "title I modification" and "modification under any provision of title I" should be interpreted to include minor NSR modifications.

This proposal parallels a proposed revision to the regulations at part 70 of this chapter (59 CFR 44460 (Aug. 29, 1994)), on which EPA solicits comment. A more detailed discussion of the rationale for this interpretation is presented in the preamble to that proposed revision.

B. Section 71.3 - Sources Subject to Permitting Requirements

Section 502(a) of the Act subjects all affected sources (as provided in title IV), major sources, sources (including area sources) subject to standards or regulations under sections 111 or 112, sources required to have permits under parts C or D of title I, and any other source in a category designated by EPA, to the permitting requirements of title V. Section 502(a) also provides the Administrator the

discretion to exempt one or more source categories (in whole or in part) from the requirement to obtain a permit "if the Administrator finds that compliance with such requirements is impracticable, infeasible or unnecessarily burdensome on such categories." The Act specifies that major sources may not be exempted from these requirements. This requirement applies both to sources that are major for criteria pollutants and those that are major emitters of the HAP listed at section 112(b). However, section 112(r)(7)(F) of the Act also provides that sources that are subject solely to regulations or requirements under section 112(r) of the Act are not required to obtain a permit under this part.

1. Temporary Exemptions for Nonmajor Sources

Section 70.3(b)(1) of this chapter deferred the applicability of part 70 to nonmajor sources (except for affected sources and solid waste incineration sources) that would otherwise be subject because they are in a source category that is subject to part 70, such as one regulated by a section 111 or 112 standard. In the final part 70 rule, EPA stated its intent to propose rulemaking to resolve the exception status of these nonmajor sources within 5 years following the first full or partial approval of a State program with a deferral.

The EPA proposes to follow the same approach to deferrals for purposes of part 71. Accordingly, nonmajor sources (in any source category that would otherwise be subject to part 71) are temporarily exempt from the requirement to obtain a part 71 permit. This exemption

would last until EPA completes a rulemaking to determine how the program should be structured for nonmajor sources and whether any additional permanent exemptions would be appropriate.

Any part 71 source whose obligation to obtain a permit is deferred would be able to request a permit prior to the end of the deferral period.

2. Permanently Exempted Source Categories

The EPA proposes to exempt permanently two source categories from the requirement to obtain a part 71 permit:

(1) All sources that would be required to obtain a permit solely because they are subject to regulation under the demolition and renovation provisions of the NESHAP for asbestos (40 CFR 61.145); and

(2) All sources that would be required to obtain a permit solely because they are subject to regulation under the NSPS for residential wood heaters (40 CFR 60.530).

These source categories were exempted from permitting requirements under part 70 because the Administrator determined that permitting such sources would be impracticable, infeasible, and unnecessarily burdensome. This exemption is proposed to be continued for part 71. A more detailed rationale for this exemption is provided in the preamble to the part 70 regulations at 57 FR 32263-4 (July 21, 1992), which EPA today incorporates by reference for purposes of part 71.

3. Major Section 112 (HAP) Sources

Like the proposed revisions to part 70 of this chapter, today's proposal would ensure that the definition of major source in this part matches the definition in section 112(a) of the Act and in the regulations governing HAP sources recently promulgated in 40 CFR part 63. Under 40 CFR Part 63, EPA definition of a major source of HAP is more inclusive than the definition originally promulgated in part 70. Unlike part 70, the part 63 definition of major source does not reference standard industrial classification (SIC) codes. As defined in part 63, an entire contiguous or adjacent plant site is considered a single source, rather than being subdivided according to industrial classification. See 59 FR 12412 (March 16, 1994). This definition does not limit the sources (or emission units) that can be included in a stationary source to those having the same 2-digit code. One result of this more inclusive definition is that there will likely be some HAP sources that are major under part 63 but are not major under part 70, as originally promulgated. The EPA believes it is necessary to expand the major source definition in part 70 and part 71 to include all sources that are major for part 63. Otherwise, those sources subject to a section 112 standard or other requirement will not have to apply for and obtain a part 71 permit until required to do so by a specific section 112 standard. Today's proposal, and the proposed revisions to part 70 of this chapter, reflect the more inclusive part 63 definition and ensure that HAP

sources are treated consistently under rules promulgated pursuant to section 112 and title V of the Act.

The requirement to obtain a part 71 permit applies to all major sources of HAP even if those sources will not be subject to any applicable requirements. Although certain permits could thus contain no substantive requirements (so-called "hollow permits"), they would serve to identify sources of HAP and to provide an inventory of their emissions. They would also provide a mechanism for the imposition of case-by-case maximum achievable control technology (MACT) under sections 112(g) or (j) of the Act, and for the inclusion of MACT standards when they are promulgated.

4. Section 112(r) Pollutants

Section 70.3(a)(3) of this chapter, as originally promulgated, requires any source subject to a standard or other requirement under section 112 of the Act to obtain a part 70 permit unless it would be subject to part 70 solely because it is subject to regulations or requirements under section 112(r). Section 112(r)(3) requires EPA to promulgate a list of regulated substances and thresholds for the prevention of accidental releases. Section 112(r)(4) establishes criteria for the development of a list of regulated substances, focusing on acute effects that result in serious off-site consequences, rather than chronic effects. As a result, many of the substances listed in § 68.130 of this chapter pursuant to section 112(r)(3)

(59 FR 4478 (January 31, 1994)) are not regulated elsewhere under the Act.

Questions have been raised as to whether § 70.3(a)(1) of this chapter, which provides that "any major source" is subject to the permit rule, requires that sources that have major source levels of section 112(r) pollutants must be permitted. Setting aside the issues of whether and how major source status is to be determined for section 112(r) purposes, section 112(r)(7)(F) exempts from title V permitting requirements any source that would be subject to title V only as result of being subject to section 112(r) requirements. That section provides that "(n)otwithstanding the provisions of title V or this section, no stationary source shall be required to apply for, or operate pursuant to, a permit issued under such title solely because such source is subject to regulations or requirements under this subsection." Thus, it is clear that even if a source could be considered a "major source" for section 112(r) purposes, it would not be subject to title V permitting on that basis alone. The EPA's proposed revisions to 40 CFR part 70 would revise § 70.3(a) of this chapter to clarify this point. Similarly, proposed § 71.3(a) reflects this approach.

D. Section 71.4 - Program Implementation

Proposed Section 71.4(a) describes the circumstances in which EPA would establish a full or partial Federal operating permits program for a State, excluding Tribal areas. Section 502(d)(3) of the Act requires EPA to promulgate, administer, and enforce a program for a State if

an operating permits program for the State has not been approved in whole by November 15, 1995. However, the requirement that EPA establish a Federal program by November 15, 1995 for States lacking a fully approved program is suspended if a State program is granted interim approval. The duty to implement a Federal program then reapplies upon expiration of an interim approval, if the State has not received full approval by that time. Therefore, § 71.4(a)(1) proposes that EPA will implement a part 71 program when a State fails to submit an operating permits program to EPA, when a program was not submitted in time for EPA to take action on the submittal by November 15, 1995, or when the program submitted was not sufficient to warrant full approval or interim approval that extends beyond November 15, 1995.

The EPA would also establish a part 71 program for a State when interim approval of a State program expires, if that date is after November 15, 1995, and if corrective program provisions have not been adopted and submitted to EPA in time for EPA to grant the program full approval by then. Because section 502(g) of the Act provides that the suspension of the Federal program requirement expires with the expiration of interim approval, the requirement that EPA promulgate a Federal program is effective immediately upon that expiration, if expiration occurs after November 15, 1995.

As provided in proposed § 71.4(a)(3), EPA would have the authority to establish a partial part 71 program in

limited geographical areas of a State if EPA has approved a part 70 program (or combination of part 70 programs) for the remaining areas of the State. This should avoid unnecessary disruption of partial programs that have been approved within a State and avoid intruding into the State's administration of its air program where only certain jurisdictions have failed to implement an approvable part 70 program.

The proposed rule also provides for EPA implementation of part 71 programs to ensure coverage of Tribal areas. The proposed Tribal rule generally describes EPA's authority for implementing programs under the Act to protect Tribal air quality. 59 FR 43960-1. That discussion is incorporated here by reference.

In broad overview, the Act authorizes EPA to protect air quality on lands over which Indian Tribes have jurisdiction. The overarching purpose of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." section 101(b)(1). The members of the public residing on lands over which Tribes have jurisdiction are equally entitled to air quality protection as those residing elsewhere.

Several provisions of the Act evince Congressional intent to authorize EPA to directly implement programs under the Act where there are voids in program coverage (e.g., sections 110(c)(1), 301 (d)(4) and 502 (d)(3), (i)(4)).

Federal implementation of Clean Air Act programs on Indian lands is particularly appropriate where Federal action will prevent a "vacuum of authority" in air quality protection. See Phillips Petroleum Co. v. EPA, 803 F.2d 545, 555-56 (10 Cir. 1986) (affirming EPA's authority to directly implement Safe Drinking Water Act Underground Injection Control program on Indian lands where concluding otherwise would contradict the meaning and purpose of the Act by creating "a vacuum of authority over underground injections on Indian lands, leaving vast areas of the nation devoid of protection from groundwater contamination"). Based on the proposed interpretation of Tribal jurisdiction under the Act in EPA's Tribal rule, discussed previously, EPA would have authority under today's proposed rules to implement part 71 programs for all areas within the exterior boundaries of an Indian reservation and other areas over which an Indian Tribe has jurisdiction.

If finalized as proposed, the Tribal rule will authorize Tribes to develop and submit title V operating permit programs to EPA for approval. The EPA's principal objective would be to assist Tribes in developing and administering their own title V operating permit programs, similar to the manner in which EPA has assisted States. The EPA recognizes that ultimately Tribes are best situated to provide primary protection of Tribal air resources. To these ends, EPA's proposed Tribal rule provides the following:

part 71 preamble

> It is EPA's policy to assist Tribes in developing comprehensive and effective air quality management programs to insure that Tribal air quality management programs will be implemented to the extent necessary on Indian reservations. EPA will do this by, among other things, providing technical advice and assistance to Indian Tribes on air quality issues. EPA intends to consult with Tribes to identify their particular needs for air program development assistance and to provide on-going assistance as necessary.

59 FR 43961.

However, EPA also intends to be prepared to implement title V programs in the event Tribes do not. To avoid gaps in title V permits program coverage, the rules proposed today authorize EPA to implement a title V operating permits program for Tribes that do not develop their own programs.

The more difficult issue is when EPA should implement title V programs for Tribes. EPA believes it is reasonable to give Tribes some opportunity to develop their own title V programs, assuming EPA's final Tribal rule authorizes them to do so, before EPA directly implements title V programs. States were given three years to submit title V programs following enactment of the 1990 amendments to the Act. See section 502(d). However, States have had a considerable advantage over most Tribes in administering air quality programs, including, in many instances, state operating permit programs. The head start States had would perhaps

militate toward giving Tribes more time to develop a program before initiating Federal implementation.

On the other hand, the title V operating permit program provides one of the central, enforceable mechanisms to apply Act requirements to sources. Gaps in coverage, particularly for a significant interim period, may undermine effective air quality protection.

The part 71 rules propose to authorize EPA to implement the title V permit program for Tribes if a Tribal program has not been fully approved by November 15, 1995. The program would become effective when the Administrator provides written notice to the Tribal chairperson or analogous Tribal leader.

The EPA requests comment on whether the part 71 rules should include a specific date by which EPA would actually implement part 71 programs for Tribes. Further, EPA requests public comment on what date would be appropriate. One possible approach that EPA may consider is to require that part 71 programs be implemented within a certain time period (perhaps 3 years) following the promulgation of this rule or of the Tribal rule. However, nothing in today's proposal would prevent EPA from implementing a part 71 program for a Tribal area subsequent to November 15, 1995 but prior to any deadline set by the rule. It may be appropriate, particularly where the absence of an operating permits program would create a gap in coverage, for EPA to implement part 71 programs in advance of any deadline set by the rule.

The EPA will consider several factors in addressing this issue including: the opportunity for the development of Tribal programs that would render Federal implementation unnecessary; the importance of title V coverage, whether Tribal or Federal, in protecting Tribal air quality; and, the need to treat the potentially affected regulated community fairly and to facilitate certainty in business planning. The EPA solicits comments on whether there are other factors that should be considered in addressing the timing and implementation of part 71 programs for Tribal areas.

As proposed in § 71.4(c), EPA would promulgate a part 71 program for a permitting authority (including an eligible Tribe) if EPA determines that an approved program is not adequately administered or enforced and the permitting authority fails to correct the deficiencies that precipitated EPA's finding.[2] Where the acid rain portion of an operating permits program is not adequately administered, EPA could withdraw either the entire program or just the acid rain portion of the program. If EPA finds that the nonacid rain portion of the operating permits program is being adequately administered, EPA would generally withdraw

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[2]Although this preamble section addresses withdrawing approval of State operating permit programs, note that eligible Tribes would be treated in the same manner as States for purposes of withdrawal of program approval, assuming the Tribal rule is finalized as proposed. In that case, the provisions of 40 CFR 70.10(b)(1), which address State failure to administer or enforce an approved part 70 program, and 40 CFR 70.10(c), which addresses criteria for withdrawal of State programs, would apply equally to Tribal programs.

only the acid rain portion. In such a case, EPA would issue the acid rain portion of the source's permit using the procedures set forth in 40 CFR part 72, and the State would continue to issue the remaining portion of the operating permits and would issue all permits to sources other than acid rain sources.

When EPA determines that a State is not adequately administering its program, EPA would provide notice to the State as required by 40 CFR 70.10(b)(1). The State would then have 90 days in which to take significant action to assure adequate administration and enforcement of the program. Where EPA determines that the State has not taken such significant action within the specified time, EPA could begin implementing a Federal program immediately. Otherwise, if the State had not fully corrected the deficiency that prompted EPA's determination of failure to administer or enforce within 18 months of the determination, EPA would begin implementing a Federal program 2 years after the date of the determination. This framework is identical to that which EPA promulgated in part 70 at 40 CFR 70.10(b)(2) and (4).

The EPA acknowledges that its intent to retain the option of withdrawing only the acid rain portion of a program in appropriate situations is a change of position from EPA's statement in the preamble to the final part 70 rule (see 57 FR 32260) that should a State fail to adequately administer phase II of the acid rain program, EPA will take back the entire operating permits program. There,

EPA stated that in such a situation EPA would implement part 71, as supplemented by Federal acid rain permit issuance procedures, and would issue permits to acid rain sources within the State. The EPA notes that this discussion was not reflected in regulatory language in the finally promulgated part 70 rule, which instead provided EPA discretion to withdraw program approval in whole or in part. See 40 CFR 70.10(c)(1). Moreover, EPA explained in a May 21, 1993 guidance document entitled "Title IV-Title V Interface Guidance for States," that if EPA finds that a part 70 program is not being properly administered or enforced for title IV purposes, EPA will publish a notice in the Federal Register making this announcement and noting where permit applications are to be delivered. When publishing such a Federal Register notice, EPA may elect to withdraw approval for an entire part 70 program submittal or only the acid rain portion of it and may apply appropriate sanctions under section 179(b) of the Act.

Under part 71, EPA would retain the option of withdrawing only the acid rain portion of the program and issuing a phase II acid rain permit, rather than withdrawing the entire part 70 program and issuing a comprehensive part 71 operating permit. The EPA believes that it is reasonable and appropriate to depart from the policy stated in the preamble to the final part 70 rule regarding withdrawal of phase II acid rain authority because EPA believes that deficiencies with respect to the acid rain portion of a State program would generally not adversely

affect the remaining portions of the State program. By withdrawing approval of just the acid rain portion, EPA would minimize disruption of otherwise adequate State air programs. It should be noted that the acid rain portion of a source's operating permit contains discreet requirements that are not intertwined with the remaining provisions of the permit. For example, phase II acid rain permits generally contain a requirement that a source hold sufficient allowances to cover emissions, specify requirements for NO_x emissions and provide for continuous emissions monitoring in accordance with 40 CFR part 75. Amendments and revisions to such provisions are subject to a different set of procedures as specified in 40 CFR part 72. Thus, separate Federal administration of the acid rain permitting program in a State that fails to adequately administer the acid rain portion of its operating permits program would be a logical step where the remainder of the part 70 program was being adequately administered by the State.

Consequently, EPA proposes that where it becomes necessary for EPA to withdraw a State's acid rain permitting authority, but the balance of the State operating permits program is being adequately administered, EPA retain the discretion to leave intact the rest of the State's approved part 70 program and take over implementation of only the acid rain portion of the program. The EPA solicits comment on this approach, and on whether this approach is consistent with the requirements of title V. The EPA stresses that

section 502(i)(1) of the Act allows EPA to determine that only a portion of an approved State program is not being adequately administered and enforced. While section 502(i)(1) does not explicitly provide that where a State fails to correct an identified deficiency in a finding under section 502(i)(4), EPA may promulgate, administer, and enforce only the relevant portion of the program, EPA believes that Congress could not have intended for EPA to be compelled to withdraw and take over entire part 70 programs where only discrete portions of the program are deficient. Such a result would be unnecessarily disruptive of State air programs and would require much greater Federal intrusion into the State's air program than may be necessary to correct the faulty portion.

Section 71.4(d) addresses the circumstances in which EPA proposes to issue permits to OCS sources (sources located in offshore waters of the United States) pursuant to the requirements of section 328(a) of the Act. Section 328 of the Act transferred from the Department of the Interior to EPA the authority to regulate air pollution from sources located on the OCS off of the Atlantic, Arctic, and Pacific coasts and in the Gulf of Mexico east of 87.5 degrees longitude. On December 5, 1991 at 56 FR 63774, EPA proposed regulations to control those sources. In that proposal, EPA stated that the requirements of the Federal operating permit regulations (to be codified at 40 CFR part 71), when promulgated, would apply to those OCS sources. In response to public comments and concerns raised by the Office of the

Federal Register that EPA could not require sources to comply with nonexisting regulations, EPA did not include those requirements in the final rule promulgated on September 4, 1992 at 57 FR 40792. However, in the preamble to the final rule, EPA stated that it intended to require the OCS sources to comply with the Federal operating permit regulations, when promulgated, and reserved several. paragraphs for that purpose. In today's notice, which proposes revisions to 40 CFR part 55 in addition to the proposed Federal operating permit rules, EPA is again proposing to require an OCS source to comply with the requirements of part 71 if the source is located beyond 25 miles of States' seaward boundaries or if the source is located within 25 miles of a State's seaward boundary and the requirements of part 71 are in effect in the corresponding onshore area (COA). Section 328 requires that EPA establish requirements for sources located within 25 miles of a State's seaward boundary that are the same as would be applicable if the source were located in the COA.

Part 71 permits would be issued to OCS sources by the Administrator or a State or local agency that has been delegated the OCS program in accordance with part 55 of this chapter. As OCS sources beyond 25 miles of States' seaward boundaries would become subject to part 71 immediately upon the effective date of promulgation of part 71, they would be required to submit part 71 permit applications within 1 year of becoming subject to this part.

Proposed § 71.4(e) describes how EPA would take action on objectionable permits that have already been proposed or issued by a permitting authority. Section 505(b) of the Act and 40 CFR 70.8(c) and (d) require EPA to object to the issuance of any permit that EPA determines is not in compliance with the applicable requirements of the Act. If the permitting authority does not take appropriate action in response to EPA's objection, EPA shall modify, terminate, or revoke the permit if it has been issued and shall correct and issue the permit if it has not been issued.

As provided in 40 CFR 70.7(g) (§ 70.7(j) in the proposed revisions to part 70), if EPA finds that a State-issued permit must be reopened to correct an error or add newly applicable requirements, EPA will notify the permitting authority. If the permitting authority does not take appropriate action, EPA will revise and reissue the permit under part 71.

As provided at 40 CFR 70.8(c)(1), EPA will object to the issuance of any proposed permit that EPA determines is not in compliance with the applicable requirements of the Act or the requirements of part 70. If EPA objects within 45 days of receipt of a copy of the proposed permit, the permitting authority may not issue the proposed permit to the source. The EPA's objection, as required by 40 CFR 70.8(c)(2), shall include a statement of EPA's reasons for objecting and a description of the permit terms that the permit must include to respond to the objection. Moreover, under 40 CFR 70.8(c)(3), failure of the permitting authority

to: (1) comply with requirements in 40 CFR 70.8(a) and (b) to notify EPA and affected States, (2) submit to EPA any information necessary to adequately review the proposed permit, or (3) process the permit under procedures approved to meet the public participation requirements of part 70 would also constitute grounds for EPA objection to a proposed permit.

Under 40 CFR 70.8(c)(4), if the permitting authority fails within 90 days after EPA's objection to revise and submit to EPA a new proposed permit responding to the objection, EPA will issue or deny the permit. Proposed § 71.4(e)(1) would establish the authority for EPA's permit issuance or denial in these situations.

Likewise, proposed § 71.4(e)(1) would establish the authority for EPA to modify, terminate, or revoke a permit in response to a citizen petition filed under 40 CFR 70.8(d). The EPA's action to modify, terminate or revoke a permit would then occur consistent with 40 CFR 70.7(g)(4) or (5)(i) and (ii) (§§ 70.7(j)(4) or (5)(i) and (ii) of the proposed revisions to part 70), except in unusual circumstances, such as where there is a substantial and imminent threat to the public health and safety resulting from the deficiencies in the permit. Usually, the permitting authority would have 90 days from receipt of EPA's objection in response to a citizen petition to resolve the objection and terminate, modify, or revoke and reissue the permit in accordance with EPA's objection. See 40 CFR 70.7(g)(4), § 70.7(j)(4) of the proposed

revisions to part 70. If the permitting authority failed to resolve the objection, EPA would terminate, modify, or revoke and reissue the permit, after providing at least 30 days notice to the permittee in writing of the reasons for such action (which may be given at any time during the time period after EPA objects to the permit) and providing the permittee an opportunity for comment on EPA's proposed actions and an opportunity for a hearing. See 40 CFR 70.7(g)(5)(i) and (ii) and §§ 70.7(j)(5)(i) and (ii) of the proposed revisions to part 70. Proposed § 71.4(e)(2) would provide the authority for EPA to take such action.

Section 71.4(f) of the proposed rule would authorize EPA to use part 71 in its entirety or any portion of the regulations, as needed. For example, EPA could use the provisions for permitting OCS sources without permitting any other types of sources. Similarly, EPA could use only portions of the regulations to correct and issue a State permit without, for example, requiring an entirely new application. Proposed § 71.4(f) would also authorize EPA to exercise its discretion in designing a part 71 program. The EPA would be able to, through rulemaking, modify the national template by adopting appropriate portions of a State's program as part of the Federal program for that State, provided the resulting program is consistent with the requirements of title V.

The EPA believes it is reasonable and appropriate to provide this flexibility in implementing a part 71 program. First, such flexibility would enable EPA to intervene in the

administration and enforcement of an operating permits program only to the extent necessary to correct deficiencies. Second, it would provide EPA, after notice and comment rulemaking, the ability to appropriately tailor part 71 to the State in which it would be implemented, thus resulting in less disruption of the State air program and the daily operations of covered sources than might otherwise occur. While EPA believes that part 71 as proposed today should not result in unnecessary disruption, the Agency recognizes that further State-specific tailoring may be appropriate.

Proposed § 71.4(g) clarifies that EPA would publish a notice of the effective dates of part 71 programs. The EPA would publish such notice in the Federal Register and would, to the extent practicable, publish notice in a newspaper of general circulation in the area affected by the part 71 program. The EPA would also publish such notice for delegations of part 71 programs. Finally, in addition to notices in the Federal Register and newspapers of general circulation, EPA would send a letter to the Governor (or his or her designee) or the Tribal governing body for the affected area informing him or her of when the part 71 program or its delegation would become effective.

Section 71.4(h) proposes that EPA would be authorized to promulgate and administer a part 71 program in its entirety even if only limited deficiencies exist in a State or Tribal program. The EPA believes that such authority is necessary because limited deficiencies could have wide-

ranging impacts within a program. For example, if a State program failed to provide adequate opportunities for public or affected State participation in permitting actions, the integrity of permit content could become suspect, the public and affected States would be excluded from administrative and judicial review of permit actions, and EPA oversight of such actions could suffer, as a result of citizens not having standing to petition EPA to object to permits.

Section 71.4(i) of the proposed rule describes how EPA would take action on the initial part 71 permits in the event that a full or partial part 71 program becomes effective in a State or Tribal area prior to the permitting authority issuing part 70 permits to all subject sources. The EPA proposes to utilize a 3-year transition plan similar to that required of States under § 70.4(b)(11)(ii) of this chapter. Under proposed § 71.4(i)(1), any remaining sources that had not yet received part 70 permits from the permitting authority would be required to submit applications to EPA for part 71 permits within 1 year of becoming subject to the part 71 program. The sources that had already received part 70 permits, if any, would continue to operate under those permits, unless EPA had withdrawn part 70 approval due to the inadequacy of the part 70 permits, in which case those sources would be required to obtain part 71 permits. After receiving part 71 permit applications, EPA would act on one-third of those applications each year for the first 3 years of the part 71 program. As previously issued part 70 permits needed to be

revised or renewed, sources would apply to EPA for such revisions or renewals under part 71.

As provided in proposed § 71.4(j), EPA would have the discretion to delegate some or all of its authority to administer a part 71 program to a State or eligible Tribe. The delegation process is described further in the discussion of proposed § 71.10.

Section 71.(4)(k) of the proposed rule would authorize EPA to administer and enforce part 70 permits issued by a permitting authority under a previously-approved part 70 program after EPA has withdrawn approval of such program until they are replaced by part 71 permits issued by EPA.

Proposed § 71.4(l) describes what would happen after EPA approves a part 70 program for an area in which a part 71 program has been effective and how the Administrator, or the new part 70 permitting authority, will administer and enforce the part 71 permits until they are replaced by part 70 permits. For a State that submits a late part 70 submittal to EPA such that EPA has not approved or disapproved the submittal by November 15, 1995, part 71 becomes automatically effective until the State's part 70 program is approved by EPA. However, sources are not obligated to submit applications to EPA until 12 months after they have become subject to an effective part 71 program (unless an earlier submittal date is set by EPA). Therefore, if the State's part 70 program is approved shortly after part 71 is effective, it is highly likely that sources will submit applications to the permitting authority

rather than to EPA. Upon approval of the part 70 program, EPA will suspend further action on applications for part 71 permits. Where appropriate, applications received by EPA prior to approval of the part 70 program will be forwarded to the permitting authority after approval of the part 70 program.

Finally, proposed § 71.4(m) provides how EPA would implement the provision of section 325 of the Act if the Governor of Guam, American Samoa, the Virgin Islands, or the Commonwealth of the Northern Mariana Islands petitions the Administrator to exempt any source or class of sources from the requirements of title V of the Act.

D. Section 71.5 - Applications

Much of proposed § 71.5 is modelled on the provisions currently promulgated at 40 CFR 70.5, and on the proposed revisions to that section. See 59 FR 44460 (Aug. 29, 1994). In this notice, EPA incorporates by reference the rationale provided for these provisions, to the extent such rationale apply to a Federal operating permit program as well as to State permit programs. Copies of the part 70 rule as promulgated in July 1992 and of the notice proposing revisions to part 70 have been included in the docket for this rulemaking. Where proposed part 71 differs from promulgated part 70 or the proposed revisions to part 70 the discussion below goes into greater detail describing the part 71 proposal. Where proposed part 71 follows part 70 precedent, shorter general descriptions of the part 71 proposal are supplied. It should be noted that the

formatting of proposed § 71.5 does not correspond to that of 40 CFR 70.5. In developing proposed part 71, EPA determined that the formatting of 40 CFR 70.5 could be improved so that it is easier to follow. The EPA requests comment on this proposed formatting difference.

1. Application Shield

Section 502(a) of the Act states that it is a violation of the Act for a source to operate without a permit. Section 503(d) of the Act states that no source shall be in violation of section 502(a) of the Act before the date on which the source is required to submit an application and that the submittal of a timely and complete application protects a source from being in violation of section 502(a) while the application is being processed. Thus, an applicant who submits a timely and complete application would not be in violation of the prohibition against operating without a permit during the time in which the application is being processed. This provision is known as the application shield and is described further at proposed § 71.7(b). The application shield is a separate and distinct provision from the permit shield that would be authorized by proposed § 71.6(n).

The application shield would remain in effect until final permit issuance if the applicant complies with the following: (1) provides additional information as requested by the permitting authority by the deadlines specified; (2) supplements or corrects information upon becoming aware of the need for an update or correction; and (3) addresses

any requirements that become applicable to the source after the date a complete application has been filed, but prior to the release of a draft permit.

If the applicant fails to comply with these conditions, the application shield would cease to apply. If the shield is lost after the deadline has passed for submitting an application but before the source is issued a permit, the source could not operate without being in violation for operating without a permit.

2. Application Completeness Determinations

As provided by proposed § 71.5(c), a complete application would be one that the permitting authority has determined contains all the information needed to begin processing. The preamble to the proposed revisions to part 70 discusses two options for providing flexibility when determining application completeness. The first option addresses applications for sources with future-effective compliance dates, and the second option addresses the submittal of less-detailed applications for sources that are scheduled to be permitted in the second and third years of the initial phase-in of a part 70 program. See 59 FR 44460 (Aug. 29, 1994).

Although the regulatory language concerning completeness determinations in the part 71 proposal is consistent with the regulatory language in the proposed part 70 revisions, EPA is not anticipating revising the proposed part 71 regulatory language to specifically implement either of the flexibility options discussed in the

preamble to the proposed revisions to part 70. As EPA is not as familiar with sources as State and local permitting authorities, EPA is not in a position to adequately quality assure applications that apply such flexibility options. Thus, the use of such flexibility options in determining application completeness could increase the risk of inappropriate completeness determinations by EPA, as well as increase EPA's administrative burden. As a result of this concern, EPA is not proposing to provide for the flexibility options described in the preamble to the revisions to part 70, but solicits comment on this position.

3. Events That Make a Source Subject to the Program

The proposed rule would require a source that does not already have an existing part 70 operating permit to submit an application within 12 months of becoming subject to the part 71 program. Such sources generally would become subject to part 71 on the later of the following dates:

(1) The date that a part 71 program becomes effective for the State or Tribal area where a source is located,

(2) The date that the source commences operation,

(3) The end of any deferral for nonmajor sources, or

(4) The date that the source meets any of the applicability criteria of proposed § 71.3.

For example, part 71 applicability would be triggered for a nonmajor source that has not been exempted from the requirements to obtain a permit (pursuant to proposed § 71.3(b)(2) or by another EPA rulemaking) when the nonmajor source becomes subject to applicable requirements under

section 111 or 112 of the Act for the first time. Another example would be when a nonmajor source that is exempted from having to obtain a part 71 permit and that is not subject to applicable requirements of sections 111 or 112 of the Act increases its potential to emit to the point where it is a major source.

Part 71 sources that are already operating under a part 70 permit at the time that a part 71 program becomes effective in a State would not have to submit part 71 applications unless they need to renew or revise their part 70 permits. The procedures of part 71 would be used to process such revisions or renewals. Sources renewing their part 70 permits would be required to submit complete information concerning all activities occurring at the facility and would then be issued a part 71 permit. Sources revising their part 70 permits would only need to submit information addressing the parts of the permit that will change; such sources would then be issued a revised part 70 permit under part 71 procedures.

Under both parts 70 and 71, the requirement to obtain a permit would be deferred for most nonmajor sources; however, certain administrative events may occur that will end the deferrals and make nonmajor sources subject to the requirement to obtain a permit. For example, nonmajor sources may become subject to title V permitting when an individual EPA rulemaking regulates a category or subcategory of nonmajor sources and does not continue the deferral for these sources. Also, the deferral for nonmajor

sources may end when EPA publishes a rulemaking that it has committed to undertake to specifically address the permitting of nonmajor sources for purposes of title V.

4. Early Application Submittal Requirements

Proposed section 71.5(b)(1) would allow the permitting authority to require certain sources to submit their applications earlier than 12 months after the program is approved; however, this date may not be before the program becomes effective. This proposed early submittal requirement is based on section 503(c) of the Act. Sources could be selected by the permitting authority for early submittal based on criteria such as source category or type, the applicable requirements that apply, or on any other basis. Selected sources would be notified by the permitting authority and given reasonable time to submit their applications. In no case would this notice be given less than 120 days in advance of the submittal date. The method used to notify sources of the requirement to make early submittals would be at the discretion of the permitting authority and may take several forms, including individual notice by letter, publication in a newspaper of general circulation in the general location where the source will operate, publication in the Federal Register, publication in an official State publication, or a combination of these methods.

5. Treatment of Confidential Information

The treatment of confidential information within the Federal operating permits program would be controlled by

regulations under 40 CFR part 2, subpart B. These regulations allow confidential treatment for trade secrets or other business information when the business obtains business advantages from its rights in the information, but exclude confidential treatment for information that is emissions data or a standard or limitation (§ 2.301(e) of this chapter). Emissions data is defined in § 2.301(a)(2) of this chapter, in part, as information necessary to determine the identity, amount, frequency, concentration, or other characteristics of any emission actually emitted by the source, or that the source was authorized to emit under an applicable standard or limitation.

6. Insignificant Activities and Emission Levels

Proposed § 71.5(g) would allow insignificant activities or emission levels to be exempt from the application content requirements of proposed § 71.5(f). These exemptions would reduce the administrative burden on sources by eliminating the requirement that a source include in its application an extensive analysis of insignificant activities (or emissions units) and quantities of emissions. This proposal is based on the part 70 provisions regarding insignificant activities and emissions levels, and is supported by the Alabama Power decision, where the court found that emissions from certain small modifications and emissions of certain pollutants at new sources could be exempted from some or all PSD review requirements on the grounds that such emissions would be de minimis. See Alabama Power v. Costle, 636 F.2d 323, 360 (D.C. Cir., 1979). In other words, EPA may determine levels

below which there is no practical value in conducting an extensive review. In general, an agency can create this exemption where the application of a regulation across all classes will yield a gain of trivial or no value. A determination of when a matter can be classified as de minimis turns on the assessment of particular circumstances of the individual case. For EPA to establish that an emissions threshold is trivial and of no consequence, EPA must consider the size of the particular emissions threshold relative to the major source threshold applicable in the various areas where a regulation will be in effect.

In the rulemaking establishing requirements for State operating permits programs under part 70, many commenters suggested that EPA create a de minimis exemption level for regulated air pollutants, and that emissions information not be required for pollutants below this de minimis level. In the final part 70 rule, EPA gave States discretion to develop lists of insignificant activities and to set insignificant emission levels if certain criteria were met and subject to EPA review and approval. In the proposed part 71 rule, EPA has fashioned provisions for insignificant activities or emission levels that meet the minimum requirements for States under the part 70 rulemaking, while taking a unique Federal approach, based on the Agency's experience in reviewing State provisions for insignificant activities and emission levels in the course of part 70 operating permits program reviews. The EPA notes, however, that the part 70 provisions on insignificant activities and

emissions levels are the subject of ongoing litigation settlement discussions, and that a possible result of these discussions could be a modification of the part 70 provisions on this issue. To the extent any future proposed revisions to the part 70 insignificant activities and emissions level criteria are more stringent than the provisions proposed for part 71, EPA may have to supplement this proposal to make the two rules consistent.

In this rulemaking, EPA proposes to exempt all information required by proposed § 71.5(f) concerning insignificant activities inclusion in the permit application, while for insignificant emission levels, application information completeness requirements would vary from proposed § 71.5(f). To ensure that all significant information is included in the permit application, the proposed rule includes a provision stating that no activities or emission levels shall be exempt from proposed § 71.5(g) if the information omitted from the application is needed to determine or impose any applicable requirement, to determine whether a source is major, to determine whether a source is subject to the requirement to obtain a part 71 permit, or to calculate the fee amount required under the fee schedule established pursuant to proposed § 71.9. The proposed prohibition against omitting information from the application that is relevant to the determination or imposition of applicable requirements means that an activity (or emissions unit) that has applicable requirements could not be considered as an insignificant activity or to have

insignificant emission levels. Applicable requirements in this context include any standard or requirement as defined in proposed § 71.2. The proposed provision that the exemption not interfere with the requirement to obtain a part 71 permit is necessary to insure that all the requirements of the Act are met, because the requirements of title V of the Act are not included in the proposed definition of applicable requirements. An activity or emission level could not be insignificant if it constitutes a major source. An activity or emission level could not be insignificant if omitting the emissions from the application would prevent the aggregate source emissions from exceeding the major source threshold or a threshold that would trigger an applicable requirement, such as a modification under section 112(g). This proposal would further prohibit these exemptions from being used by applicants when information needed to calculate the fee amount required under the fee schedule would be omitted from the application. Although the fee schedule provided in proposed § 71.9(c)(1) would exclude insignificant emissions from being counted for fee purposes, this provision would be retained for instances where the Administrator promulgates a different fee schedule for a particular state pursuant to proposed § 71.9(c)(7). Under such a fee schedule, information concerning insignificant activities or emissions may be needed to calculate the fee amount.

a. Insignificant Activities. To meet the requirements of part 70, States submitted rules incorporating a wide

variety of approaches for implementing these provisions. Many State part 70 program submittals included extensive lists of insignificant activities. Some of the listed activities were so broadly defined that it was difficult to determine if they would interfere with the determination or imposition of applicable requirements or affect major source status, seemingly inviting the omission of significant information. Some were so narrowly defined that industry would be invited to propose an endless number of additional listings for inclusion in the rules in future years, creating an administrative burden on the States. In the course of EPA's review of part 70 permit program submittals, it was also clear that there were very few insignificant activities that are common among the States. The EPA proposes to include a short list of broadly-defined insignificant activities that are frequently included in State part 70 program submittals. These activities commonly occur in residential settings, are not subject to applicable requirements (with the possible exception of certain SIP-based requirements for residential heating sources that are not commonly adopted on a nation-wide basis), and normally have small quantities of emissions. Emission units at a source that are on the list of insignificant activities in proposed § 71.5(g)(1) could not be treated as insignificant (1) when the activities are subject to an applicable requirement, including an applicable requirement of a Federal or Tribal implementation plan, (2) if information concerning the activities would interfere with any

applicability determination, (3) if the insignificant activities constitute a major source, (4) if not counting the emissions from insignificant activities in the total source emissions would prevent the source from being determined to be a major source, or (5) if any information that would otherwise be left off of the permit application would be needed to calculate the fee amount required under the fee schedule established under proposed § 71.9.

b. Insignificant Emission Levels. The proposal would further allow emission units or activities with small emissions to be included in the application in a streamlined manner, as long as the application did not exclude information needed to (1) determine or impose applicable requirements, (2) determine the requirement to obtain a permit, (3) determine whether the source is a major source, or (4) calculate the fee amount, and provided the emissions caps of proposed § 71.5(g)(2) were not exceeded. The EPA believes that this would ensure that enough information will be provided that the permitting authority can make a quick assessment of whether the emissions are insignificant. Nevertheless, to ensure that the rule is being applied properly by the applicant, the permitting authority could request additional information if needed. Note that to qualify as insignificant emissions, the emissions could not count toward or trigger a unit-based de minimis permit revision under proposed § 71.7(f). The only emissions units that would have emissions levels qualifying as insignificant under proposed § 71.5(g) would be units that would not be

included in the part 71 permit anyway because they could not be subject to applicable requirements, contribute to the triggering of an applicable requirement, or affect a major status determination. Therefore, for existing units with insignificant emissions there would not be any permit terms or conditions to revise and for new units with insignificant emissions there would not be any permit terms or conditions to add to the part 71 permit.

The emissions caps of proposed § 71.5(g)(2) are expressed in terms of potential to emit, not actual emissions. The use of potential to emit is consistent with how major source thresholds (which were used in developing the proposed caps) are defined. Furthermore, EPA believes that basing the caps on potential to emit provides greater assurance that only truly insignificant levels of emissions would be eligible for streamlined treatment on the permit application form.

In commenting on the necessity of de minimis levels to be established in the part 70 rulemaking, one commenter suggested the level be set at 5 tpy or 20 percent of the applicable major source threshold. An examination of these levels in terms of major source thresholds is necessary to determine if they are trivial. For example, a 5-ton emission is 20 percent of the major source threshold for serious and severe ozone nonattainment areas, but 50 percent of the major source threshold in extreme ozone nonattainment areas. A level set at 20 percent of the applicable threshold would equal 2 tons in extreme ozone nonattainment

areas, but would be 20 tons in moderate nonattainment areas. It is not clear that emissions of this size could be characterized as trivial in all areas for all air pollutants, especially because emissions at these levels may trigger State major new source review (NSR), thus triggering applicable requirements.

Therefore, EPA is proposing and soliciting comment on setting the threshold for insignificant emission levels at 1 tpy for regulated air pollutants, except HAP, in all areas except extreme ozone nonattainment areas, where the threshold is proposed to be 1,000 pounds (lb) per year. These levels would be 1 percent of the major source threshold in moderate nonattainment areas, 2 percent in serious ozone nonattainment areas, 4 percent in severe ozone nonattainment areas, and 5 percent of the threshold in extreme ozone nonattainment areas. The EPA believes that these levels are trivial and would not prevent EPA from collecting any information of a consequential or significant nature. The lower threshold for extreme ozone nonattainment areas is necessary due to the increased concern that permitting authorities would have in such areas. Permitting authorities in these areas have collected information pertaining to permitted sources with relatively small emissions. This level of concern has been necessary in order to achieve emission reductions sufficient to make progress towards meeting the NAAQS.

The EPA proposes and solicits comment on setting the exemption threshold for HAP for any single emissions unit to

be the lesser of 1,000 lb per year or the de minimis levels established under section 112(g) of the Act. In the part 70 rulemaking, EPA recommended that the emissions levels for HAP established for the purpose of setting insignificant emission levels not be less stringent than the levels established for modifications under section 112(g) of the Act. Although this was only a recommendation, many States structured their emissions levels for HAP using these levels as upper bounds. Note that the provisions of proposed § 71.5(g) would prevent a part 71 emissions unit from having insignificant emissions levels if the unit was subject to applicable requirements of section 112(g). The EPA also proposes that the level for HAP should never be higher than 1,000 pounds per year. This is necessary because the major source threshold is 10 tpy for a single HAP, thus ensuring that insignificant emissions of HAP will never exceed 5 percent of the major source threshold. The EPA believes that these levels are trivial and would not prevent EPA from collecting any information of a consequential or significant nature.

The EPA proposes and solicits comment on setting the threshold for insignificant emissions for the aggregate emissions of any regulated air pollutant, excluding HAP, from all emission units located at a facility to not exceed a potential to emit of 10 tpy, except in extreme ozone nonattainment areas, where potential to emit may not exceed 5 tpy. The EPA further proposes and solicits comment on setting the threshold for insignificant emissions levels for

the aggregate emissions of all HAP from all emission units located at a facility to not exceed a potential to emit of 5 tpy or the section 112(g) de minimis levels, whichever is less. These provisions would provide more certainty to the permitting authority because no emissions values in terms of potential or actual emissions would be required to be included in the application for emissions qualifying as insignificant, and it is conceivable that large quantities of emissions could be hidden from scrutiny without such aggregate emission thresholds. In addition, these provisions would clarify for applicants that large numbers of similar sources, such as valves or flanges, that might be exempt on an individual basis, would have to be described in detail in the application if the aggregate emissions from all the units are relevant to the applicability of the Act's requirements or the determination of major source status.

Minimal information concerning emissions units with insignificant emissions would have to be provided in a list in the application. This list would have to describe the emission units in sufficient detail to identify the source of emissions and demonstrate that the exemption applies. For example, the description "space heaters" on a list may not provide sufficient information because there could be an unlimited number of units with potentially significant emissions, but the description, "two propane-fired space heaters," places a limit on any estimate of emissions and would provide enough information. Descriptions may need to specify not only the number of units meeting the

description, when more than one unit is included under a single description, but in many cases capacity, throughput, material being processed, combusted, or stored, or other pertinent information may need to be provided. For example, "storage tank" would be insufficient, but "250 gallon underground storage tank storing unleaded gasoline, annual throughput less than 2,000 gallons," would be sufficient for quick assessment, because this level of information is sufficient to demonstrate whether any applicable requirements apply and that the 1 tpy emissions cap would most likely not be exceeded.

Emissions units (or activities) with insignificant emissions that might be logically grouped together on the list that would be required by proposed § 71.5(g)(2) but that have dissimilar descriptions, including dissimilar capacities or sizes, would be required to be listed separately in the application. This is necessary to prevent large numbers of emissions units from being grouped together on the list in such a way that the description would be too broad to provide sufficient information to identify the emissions units and provide an indication of whether or not the exemption applies. On the other hand, in certain cases, large numbers of certain activities could be grouped together on the list. For example, a complex facility may have hundreds of valves and flanges where the aggregate potential to emit of all the valves and flanges does not exceed the aggregate emissions cap and there are no applicable requirements that apply to the valves and

flanges. In this case, it would most likely be appropriate to list all the valves and flanges together as one listed item, including the number of units meeting the exemption.

The EPA solicits comment on the approach regarding insignificant activities and emission levels proposed in this notice, particularly on whether this approach provides greater clarity than that discussed in promulgated part 70, and whether the approach proposed in this notice would be compatible with the approaches developed by States to date. The EPA also solicits comment regarding whether the approach proposed today provides adequate safeguards to insure that part 71 permit applications do not exclude significant information, especially all information necessary to determine applicability of Act requirements and major source status.

7. The Contents of a Complete Application

The following is a brief discussion, organized by regulatory paragraph (as found in proposed § 71.5(f)), of the types of minimal information that would have to be included in permit applications in order for them to be determined complete:

a. Identifying Information. This information would consist of names, addresses, and phone numbers for the company, plant site, owners, operators, responsible officials, and others.

b. Plant Description. A description of the source's processes and products associated with each operating

scenario, including identification by Standard Industrial Classification code, would be required.

c. Emissions-Related Information. Emissions data are of critical importance to permitting. Generally, these data include the pollutants emitted, estimates of their quantities over appropriate time periods, and descriptions of the emission points; description of raw material usage; a detailed description of air pollution control equipment and compliance monitoring devices or activities (and citations to the relevant emissions standards); and limitations on source operation that would affect plant emissions or any work practice standards.

d. Air Pollution Control Requirements. Proposed § 71.5(f)(4) would require information concerning air pollution control requirements, including citations and descriptions of all State and Federal air pollution control requirements applicable to the part 71 source. This information would have to be included in the application for each emissions unit at a part 71 source.

In addition, the application would have to describe or reference any monitoring or test methods used to determine compliance with each applicable emission limitation or standard that pertains to sources. These monitoring or test methods may be specified by the applicable requirement (e.g., NSPS or NESHAP) or by requirements promulgated pursuant to sections 114(a)(3) of the Act, concerning enhanced monitoring and compliance certification, and 504(b) of the Act, concerning monitoring and analysis.

Proposed § 71.5(f)(3)(v) would further clarify that the application or attachments should include a brief description of any appropriate operation and maintenance procedures (O&M) and quality assurance (QA) procedures. These descriptions need only cite the source of the applicable requirements or EPA guidance documents used to develop the procedures and a brief summary of the types of activities or procedures that will be undertaken. This proposed requirement would not compel an applicant to attach an exhaustive O&M plan, for example, to the application; however, it would not preclude the permitting authority from requesting such information at a later date. This proposed requirement also would not mandate the submittal of O&M or QA information in regard to other equipment, activities, or processes that might occur at the facility but that are not directly related to control equipment or compliance monitoring devices or activities.

Operation and maintenance (O&M) practices and procedures are generally defined within EPA guidance developed for specific types of control equipment (e.g., "Operation and Maintenance for Electrostatic Precipitators," EPA/625/1-85/017, September, 1985). Generally, O&M programs are important because conscientious application of an O&M program can minimize deterioration of system components and resulting decreases in pollution control efficiency, which can lead to unexpected noncompliance with emission limits.

Quality assurance and quality control procedures (QA/QC), such as maintenance, calibration, and data validation procedures, are essential to evaluating the data derived from the monitoring devices to determine the accuracy or competency of the data. The EPA has issued guidance on QA/QC for certain monitoring equipment (e.g., "Quality Assurance Handbook for Air Pollution Measurement Systems," EPA-600/4-77-027a, September 1989), including procedures for calibration, maintenance, and data validation. Applicable requirements with respect to Continuous Emissions Monitoring Systems (CEMS) are contained in 40 CFR part 60, Appendix F and for Continuous Opacity Monitoring Systems (COMS) at 40 CFR part 51, Appendix M.

e. Other Specific Information. Consistent with proposed § 71.5(f)(5), the application (or attachments) may need to contain other information necessary to implement and enforce other applicable requirements of the Act or of part 71, or to determine the applicability of such requirements. An example of an applicable requirement requiring the submittal of other specific information is found in the proposed enhanced monitoring rule, where enhanced monitoring protocols are required to be submitted with the title V permit application (58 FR 54686). In addition, proposed § 71.7 would require an applicant to submit a proposed addendum to the existing permit when requesting permit revisions for changes qualifying for administrative permit amendment, de minimis permit revision, or minor permit revision procedures.

f. Proposed Exemptions. Consistent with proposed § 71.5(f)(6), exemptions from applicable requirements could only be used by an applicant if the exemption is:
(1) Approved into the SIP or FIP by EPA, thereby making it a federally-enforceable applicable requirement; or
(2) provided for in the applicable requirement itself, such as when a NSPS provides for grandfathering of sources existing before a certain date.

g. Operational Flexibility. Proposed § 71.5(f)(7) would require applicants to supply information in their applications necessary to define any alternative operating scenarios they identify in their applications, pursuant to proposed § 71.6(a)(8), or to define permit terms and conditions implementing proposed §§ 71.6(p) and 71.6(a)(9). In general, the permitting authority would have to receive enough information in this regard to write permit terms and conditions that do not violate any other applicable requirements and meet the compliance requirements of proposed § 71.6(a) and (c).

The permitting authority would have to receive enough information concerning alternative operating scenarios to identify the unit, determine the quantities and air pollutants emitted under each scenario, any additional applicable requirements that might be triggered, and any new monitoring, record keeping, and reporting requirements necessary to assure compliance under each scenario. Proposed § 71.5(f)(8) would require that applications for sources planning to participate in an emissions trading

program provided for in proposed § 71.6(a)(9) identify the emissions units eligible for the trading and those emissions units at which changes may be processed under the de minimis permit revision procedures of proposed § 71.7(f).

h. Compliance Plan. This section of the application form would have to describe the source's compliance status with respect to all applicable requirements. The source would have to include a narrative description of how it will achieve compliance with requirements for which it is currently not in compliance, state that it will continue to comply with requirements with which it is in compliance, and state that it will meet future-effective requirements within the deadlines specified by the applicable requirement. Future-effective requirements are applicable requirements that have been promulgated or approved by EPA at the time of permit issuance.

Sources with future-effective requirements would have to submit a schedule of compliance only if required by the applicable requirement. However, all sources that are not in compliance with all applicable requirements at the time of permit issuance would have to submit a schedule of compliance. A schedule of compliance is a schedule of remedial measures including an enforceable sequence of actions with milestones, leading to compliance with all applicable requirements of the Act. The schedule would have to specify a date by which the source will achieve compliance.

Each permittee required to have a schedule of compliance to remedy a violation or violations would have to submit progress reports to the permitting authority every 6 months, or more frequently, if required by the applicable requirement or the permitting authority. These reports would have to describe the source's progress in meeting the schedule of compliance. The compliance plan would have to set forth the schedule for submission of these reports.

The compliance plan content requirements specified in proposed § 71.5(f)(9) would also apply to affected sources under title IV of the Act. This means that affected sources would have to address all applicable requirements of the Act, including title IV requirements, within the compliance plan portion of the part 71 permit application. Affected sources are also required by part 72 of this chapter to submit part 72 permit applications that address the requirements of the acid rain program. Within the part 72 permit applications, only the compliance plan requirements of part 72, subpart D must be met. The compliance plan content requirements of parts 71 and 72 described above must be met whether the part 71 and 72 permit applications are submitted at the same time or on different schedules.

i. Compliance Certification. Proposed § 71.5(f)(10) would require applicants to submit a compliance certification with respect to all applicable requirements within their application. This is a different requirement from the compliance certification that would be required by proposed § 71.6(g) with respect to permit terms and

conditions, which would be required to be submitted at least annually or more frequently if required by the applicable requirement or the permitting authority.

Proposed § 71.5(f)(10) would require that each compliance certification state the methods to be used to determine compliance during the permit term and describe specific monitoring, testing, record keeping and reporting requirements for each applicable requirement. The compliance certification would have to contain a statement of the source's compliance status with applicable enhanced monitoring and compliance certification requirements of the Act. The compliance certification would also have to contain a statement attesting to the truth, accuracy and completeness of the compliance certification, consistent with proposed § 71.5(i), signed by a responsible official.

Methods used to determine compliance include monitoring required by applicable requirements, including enhanced monitoring and compliance certification requirements, as would be required by proposed § 71.6(d)(1), and monitoring performed on a periodic, on-going basis, as would be required by proposed § 71.6(d)(2). If the underlying applicable requirement is silent regarding monitoring techniques or the technique specified by the applicable requirement is not periodic, then the applicant would have to propose a periodic monitoring technique that would be sufficient to ensure compliance with underlying requirements.

j. Forms Required by Title IV. The regulations that govern the permitting of affected sources are found at 40 CFR part 72. Applications for phase II of the acid rain program must be submitted by January 1, 1996, with issuance of the permit by January 1, 1998. When applying for acid rain permits, affected sources must submit the standardized application forms required by part 72. Acid rain and part 71 permit applications may be required to be submitted at the same time or on different schedules. If submitted at the same time, the acid rain permit application would be attached to the part 71 permit application. If submitted on different schedules, a copy of the acid rain permit application would not have to be attached to the part 71 permit. In either case, the part 71 permit application would have to address emissions units with title IV applicable requirements in the same manner as other emissions units and applicable requirements.

8. Cross Referencing Information in the Application

The permitting authority could allow the application to cross-reference relevant materials where they are current and clear with respect to information required in the permit application. Such might be the case where a source is seeking to update its title V permit based on the same information used to obtain a NSR permit or where a source is seeking renewal of its title V permit and no change in source operation or in the applicable requirements has occurred. Any cross-referenced documents would have to be included in the title V application that is sent to the

permitting authority and that is made available as part of the public docket on the permit action.

9. Applications for Temporary Sources

The permitting authority could issue a single permit authorizing emissions from similar operations by the same owner or operator at multiple temporary locations. Proposed § 71.5 would require temporary sources applying for operating permits to address within the permit application all applicable requirements of title I of the Act that apply at each authorized location, including, but not limited to, any NAAQS or increment or visibility requirements under part C of title I of the Act. This means that temporary sources would be required to include information in their applications (e.g., including ambient impact assessment information, which is source-specific data necessary for input to air quality dispersion models) to show the applicability of and the source's compliance with these requirements.

10. Applications for General Permits

The permitting authority could issue general permits for similar types of sources or source categories before any individual sources have requested such permits. Part 71 sources could apply for the general permits or an individual part 71 permit.

The permitting authority could allow for applications for general permits that deviate from other part 71 applications. This means that sources could be allowed to submit streamlined applications to operate under these

general permits. Applications for general permits could be streamlined because there would be more certainty as to the types of equipment being permitted, the applicable requirements that might apply, and the compliance devices or activities that must be used by the source to control emissions. The ability to streamline applications would be tempered by the need for the application forms to meet the requirements of title V of the Act and for the sources to include enough information to determine qualification for, and to assure compliance with, the general permit. The permitting authority could require an application for a general permit to be made using the standard form or a form designed for a specific source category. When the standard part 71 application form is used to apply for a general permit, the general permit could specify what part of the standard application form must be submitted.

E. Section 71.6 - Permit Content

Many of the proposed provisions of § 71.6 follow the provisions of 40 CFR 70.6, which were described and discussed at length in the proposed and final preambles to 40 CFR part 70, and in the recently proposed revisions to part 70. This notice incorporates the rationale provided in the part 70 notices by reference, as appropriate, and section II-F of this document describe the major provisions in proposed § 71.6. For these reasons, this discussion focuses on those provisions that are affected by the legal challenges to the part 70 rule and those issues for which

the approach proposed to be taken in part 71 differs from that taken in part 70 or the proposed revisions thereto.

The provisions of proposed § 71.6 have been formatted differently than those in 40 CFR 70.6 to consolidate the provisions related to compliance and to make the section easier to follow. The EPA solicits comment on the proposed formatting change.

1. Prompt Reporting of Deviations

Like part 70, proposed part 71 would require that each permit contain provisions for prompt notification of deviations. In both cases, the definition of "deviation" is consistent with the definition of deviation in the proposed enhanced monitoring rule. However, part 71 proposes to define "promptly" for purposes of reporting deviations from federally-issued permits.

Under this proposal and the proposed enhanced monitoring rule, deviation means any of the following conditions: where emissions exceed an emission limitation or standard; where process or control device parameter values demonstrate that an emission limitation or standard has not been met; or where observations or data collected demonstrates noncompliance with an emission limitation or standard or any work practice or operating condition required by the permit. These conditions (except in cases where provisions that exempt such conditions from being federally enforceable violations have been promulgated or approved by the Administrator) would be deemed deviations

from part 71 permit requirements and would require prompt reporting to the permitting authority.

Part 71 sources would be required to promptly notify the permitting authority of any deviations. Under part 71, promptly has more than one meaning. This follows the model established in part 70. Where the underlying applicable requirement contains a definition of prompt or otherwise specifies a time frame for reporting deviations, that definition or time frame shall govern. Where the underlying applicable requirement fails to address the time frame for reporting deviations, prompt is defined differently depending on the type of pollutant emitted. For deviations concerning a HAP or toxic air pollutant that exceed a permit requirement for at least a one hour duration, prompt reporting would be defined as within 24 hours. Sources emitting other regulated air pollutants at levels that exceed permit requirements for at least two hours would be required to report the deviation within 48 hours.

The EPA recognizes that there are other notification requirements that have been established under other statutes that require sources to provide immediate notification of releases of specific chemicals in reportable quantities to agencies other than EPA and State permitting authorities. Generally these notifications apply to a potential emergency situation such as those requirements in CERCLA and SARA title III. In addition, pursuant to section 112(r), the Chemical Safety and Hazards Investigation Board has the authority to develop regulations for reporting accidental

releases of section 112(r) substances. If a reporting regulation is established, it would become an applicable requirement on the source. The EPA stresses that sources must comply with such notice requirements even if they have provided notice to the permitting authority pursuant to proposed § 71.6(f)(3). Failure to provide notices required by these other statutes and their implementing regulations may result in enforcement actions and penalties.

Because the emissions from sources could cover a very large spectrum with a wide range of health effects, the permitting authority may also define in the permit the concentration and time duration of a deviation that must be reported promptly and the schedule for such reporting.

Sources may notify the permitting authority of a deviation by telephone or facsimile within their required time schedule, and must then submit certified written notice within ten working days. All deviations would still have to be included in monitoring reports which would be required to be submitted at least every 6 months or more frequently if required by another applicable requirement (e.g., NSPS or enhanced monitoring).

2. General Permits

Proposed § 71.6(l) would implement section 504(d), which authorizes the permitting authority to issue a "general permit covering numerous similar sources." The permitting authority could use this authority to reduce the administrative burden of the title V permitting program for both the permitting authority and the permitted sources.

The approach proposed for part 71 would follow that of part 70 and the recently proposed revisions thereto.

Prior to issuing a general permit, the permitting authority would determine whether there are source categories for which general permits might be appropriate. Criteria in any such determination would be source size and similarity of sources within the category and similarity or complexity of applicable requirements that may apply (e.g., case-by-case monitoring determinations). Categories made up of numerous, small, and nearly identical sources would be ideal.

Title V requires that the permitting authority provide notice and an opportunity for a public hearing when issuing a general permit. The final part 70 rule provided that the notice for the general permit must allow the public an opportunity to review the scope of the source category under the permit (but not necessarily a listing of specific source sites that might be covered), the terms and conditions that the permit will impose on that category, and the application process by which individual sources will receive the right to operate under the general permit.

In response to the concerns raised in the legal challenges to the part 70 rule, EPA has reevaluated its approach to providing for public participation for general permits.

In the most recent part 70 proposal, the following items concerning general permits were proposed:

(1) authorization to operate under a general permit is a

final action subject to judicial review; and (2) the permitting authority is required to notify the public of sources who have been authorized to operate under a general permit. The latter action could be done as a monthly summary. Proposed § 71.6 follows the approach of the recent part 70 proposal for general permits.

In any event, EPA does not expect to issue general permits within the first few years after promulgation of this part. Due to a lack of resources, EPA has not developed general permits for use under part 71.

3. Emergency Defense

As provided in proposed § 71.6(o), part 71 permits could contain permit terms that provide that a source can establish an affirmative defense to an enforcement action based on noncompliance due to an emergency. The affirmative defense would not apply to permit terms other than technology-based emission limitations (e.g., MACT standards) and would not apply unless the source provides appropriate documentation as specified in proposed § 71.6(o)(3). The emergency defense would be independent of any emergency or upset provision contained in an applicable requirement.

Although part 71 permits could contain provisions for an emergency defense, EPA notes that sources that produce, process, handle or store a listed substance under section 112(r) or any other extremely hazardous substance nonetheless have a general duty in the same manner and to the same extent as section 654, title 29 of the United States Code, to identify hazards assessment techniques, to

design and maintain a safe facility, and to minimize the consequences of accidental releases.

The EPA is reevaluating the provisions in parts 70 and 71 relating to the emergency defense in light of concerns identified in legal challenges to the part 70 rule. The EPA may propose revisions to the part 70 and part 71 sections providing for the emergency defense before EPA would includes such defense in any part 71 permits. In the interim, to ensure consistency with currently promulgated part 70, EPA would include in part 71 provisions allowing permit terms to establish an emergency defense.

4. Operational Flexibility

Section 502(b)(10) of the Act requires that the minimum elements of an approvable permit program include provisions to allow changes within a permitted facility without requiring a permit revision. In the current part 70 rule, EPA included three different methods for implementing this mandate. However, in response to concerns raised by petitioners and State permitting authorities charged with implementing part 70, EPA recently proposed to revise part 70 to eliminate one of those methods and clarify the operation of the others. Today's part 71 proposal adopts the same approach to operational flexibility as discussed in the proposed revision to part 70. The rationale for EPA's position on operational flexibility is set out in the proposed revisions to part 70 (59 FR 44460 (Aug. 29, 1994)), which today's notice incorporates by reference.

Following the proposed revisions to part 70, part 71 would provide options within the permit under which certain types of changes can be pre-authorized. The terms and conditions of a part 71 permit could provide for an emissions limitation ceiling under which the actual emissions and operations of the source may rise and fall without violation of the permit. Additional opportunities for flexibility in permit design are discussed below in the preamble. Some of those elements implement the mandate unique to title V under section 502(b)(10) of the Act, while others are based on the flexibility that may already exist in underlying applicable requirements. What all these provisions have in common is that they accommodate changes in a facility's operations to the extent possible under the Act's requirements without requiring that the permit be revised.

a. Off-Permit Changes. The EPA believes that the "off-permit" provisions found at §§ 70.4(b)(14) and (15) of the current part 70 rule are ambiguous and have potential for abuse. Furthermore, EPA believes the permit should be updated more frequently than required under those provisions. The EPA recently proposed to restrict the scope of off-permit changes in the part 70 rule and reduce the amount of time the change would remain off-permit. First, the changes must be submitted for review within 6 months after the change. This differs from the present procedures that allow delay in incorporating these changes in the permit until the normal permit renewal time. Second, there

can not be any net increase of emissions caused by such changes. The proposed part 71 regulations follow the approach to "off-permit" set forth in the proposed revisions to part 70, and the rationale set forth there is incorporated herein by reference. In the event that the future final part 70 rule differs from the proposed revisions, EPA intends to revisit the issue with respect to part 71.

b. Emissions Trading. As discussed in the preamble to the proposed revisions to part 70, EPA interprets section 502(b)(10) of the Act as a mandate to promote emissions trading within the permitted facilities, without creating free-floating authority for a source to revise unilaterally the compliance requirements in its permit. The combination of sections 502(b)(5)(A), 502(b)(10), and 504(a) of the Act appears to contemplate changes in a facility's operations that do not require rewriting the permit and that do not increase emissions allowable under the permit. This is a reasonable description of a well-crafted emissions trading plan with compliance terms governing pre-established emissions trading parameters. The common theme shared by the program elements implementing section 502(b)(10) of the Act is that they provide opportunities for emissions trading, while requiring that the trading plans be clearly enforceable according to established compliance terms.

c. Trading Under Permitted Emissions Caps. Trading under permit caps allows a source to propose trading plans for complying with an emissions cap where the permitting

authority establishes one in the permit independent of applicable requirements. The part 70 provision related to such trading has been challenged by petitioners, and EPA has proposed minor revisions to that provision in response to the concerns raised. Proposed § 71.6(p)(1) would incorporate the proposed revisions to part 70, as EPA believes that providing for such trading is required by section 502(b)(10).

First, the proposal makes it clear that the permitting authority must determine that an allowable emissions trading plan is consistent with all applicable requirements and meets the criteria for responsible emissions trades.

Second, any emissions trading plan developed pursuant to this provision can operate as surplusage to the underlying applicable requirements. This provision would require the permitting authority to consider emissions trading plans designed to comply with emissions caps that the permitting authority establishes in the part 71 permit in addition to applicable requirements. The rule would go on to specify that the permit must in addition require compliance with all applicable requirements. Additionally, if an emissions cap is established in the permit pursuant to a requirement in the SIP, and the SIP does not provide for emissions trading to demonstrate compliance with the cap, the mandate in the SIP for line by line compliance under the cap is the overriding requirement. This emissions trading provision therefore attaches only where the part 71 permit

alone creates the cap, not where the underlying applicable requirement provides for one.

Third, the compliance terms governing emissions trading under permit caps must be established in the permit issuance process and may only be modified at renewal or in a significant permit revision process. All the terms and conditions of any emissions trading plan must be contained in the permit, subject to public review and comment. The function of the 7-day notice under this provision is not to establish the terms of emissions trading, but rather to notify the permitting authority that the source is utilizing the trading opportunities provided for in the permit.

d. Trading Under the Implementation Plan. Proposed § 71.6(p)(2), like part 70, contains a provision that would provide for emissions trading where the applicable implementation plan provides for such trades without requiring a permit revision and based on 7-day notice to the permitting authority. Petitioners in the part 70 litigation raised the issue of whether the rule's provision for trading under an implementation plan (such as a SIP) would assure that the emissions trades allowed would be enforceable. The EPA believes that proposed § 71.6(p)(2) and its counterpart in the proposed revisions to part 70 would provide sufficient public scrutiny to safeguard against trades that are not enforceable. The SIP development process and the permit issuance process would allow the public several opportunities to raise the issue of whether the SIP or permit supplies sufficient detail to enforce compliance with

the level of emissions reduction required by the permit term that the SIP's requirements would replace. The trading provisions that a source could use under this provision must be approved into the SIP in a process that involves rulemaking on the State or local level, including a hearing, and public notice and an opportunity for comment on the Federal level. Also, the permit would have to identify those permit terms that may be replaced with the emissions trading provision in the implementation plan.

e. Emissions Trading Based on Applicable Requirements. Proposed § 71.6(a)(7), like part 70, contains a provision that provides that a permit may contain a provision that states that no permit revision shall be required under approved economic incentive or similar programs for changes that are provided for in the permit. Permits would also have to include terms and conditions for emissions trading where the applicant requests them and the underlying applicable requirements provide for emissions trading without requiring a case-by-case review of each emissions trade. Today's proposal tracks the proposed revision to part 70 in that proposed § 71.6(a)(7) clarifies that any economic incentive or similar program or process providing for emissions trading in the permit would have to first be approved in an implementation plan or other applicable requirement.

f. Alternative Scenario Logs. The current part 70 rule requires that reasonably anticipated alternative operating scenarios requested by the permit applicant be

included in the permit, provided the scenarios are consistent with applicable requirements. The source is required to keep a contemporaneous record in an on-site log of the scenarios under which it is operating. Petitioners in the part 70 litigation challenged the use of an on-site log to record changes among scenarios. They argued that under part 70, a facility could attempt to obscure evidence of noncompliance by altering, after the fact, the record of which scenario the source was operating under at a particular time.

In response to these concerns, EPA has proposed revisions to part 70 that allow a source to use an on-site log to record changes among operating scenarios only when each of those scenarios include monitoring requirements that meet two conditions. Proposed § 71.6(a)(8) incorporates the additional requirements related to on-site logs discussed below. First, each scenario would be required to be subject to monitoring requirements that yield an objective, contemporaneous record of the relevant emissions or parameters. Second, each scenario would be required to provide for a means of measuring compliance sufficiently different from the other scenario such that the contemporaneous record reveals the scenario under which the source was operating when the record was made. In any other case, the facility would be required to copy the on-site log of changes among scenarios and, for each week during which one or more changes to a different operating scenario was made, mail the log for that week to the permitting authority

(i.e., a log would not need to be submitted for a week during which no change was made). These proposed new provisions would assure that either the scenarios are monitored in a way that inherently reveals the scenario in effect at all times or the permittee reports its scenario(s) within a sufficient time period to avoid any reasonable possibility of after-the-fact tampering. Today's notice incorporates by reference the rationale provided in the preamble to the proposed revisions to part 70 on this issue.

5. Referencing of Requirements

Petitioners in the part 70 litigation have asked EPA for clarification on the subject of data that may be referenced but not includes in the permit.

In the recently proposed revisions to part 70, EPA has indicated that some referencing might be appropriate, and has requested comment on whether referencing should be allowed for: (1) test methods, (2) definitions, (3) startup, shutdown, or malfunction requirements or plans, and (4) detailed emission calculation protocols. The EPA solicits comments on referencing for part 71 permits.

F. Section 71.7 - Permit Issuance, Renewal, Reopenings, and Revisions

This section of the preamble describes in greater detail EPA's proposed regulations governing permit issuance, renewal, reopening, and revision procedures under part 71. Generally, under a part 71 program such procedures would follow the procedures in the currently promulgated part 70 rule, as recently proposed to be revised. See 40 CFR 70.7

and 59 FR 44460 (Aug. 29, 1994). To the extent proposed part 71 follows the procedures in existing part 70 and the proposed revisions thereto, this notice incorporates the rationale for those procedures by reference. Where possible, EPA believes it is appropriate to model part 71 procedures on those required by part 70, in order to promote national consistency between the title V permit programs that will be administered throughout the country. National consistency will ensure that sources are not faced with substantially different programs when EPA, as opposed to State agencies, is the permitting authority. Moreover, as part 71 programs are likely to be of limited duration, consistency with part 70 will enable smooth transition between federal and State programs, encourage States to take delegation of administration of part 71 programs, help States that have been unable to obtain part 70 approval to phase into the title V program, promote uniformity in public and affected State participation, and provide a level playing field for sources.

In certain respects, the procedures under proposed part 71 would vary from the procedures in part 70. This is usually due to the fact that EPA, as a Federal permitting authority, will not be implementing State air programs in general when it assumes title V responsibilities. Consequently, certain opportunities under part 70, such as new source review merged with title V permit revision procedures, would not be available where EPA is the permitting authority. However, where a State takes

delegation of the administration of a part 71 program, some of these opportunities would be available. These variations are discussed in detail in the relevant sections of the discussion below. In other cases, where part 70 and the proposed revisions thereto provide States with flexibility to decide among alternative approaches or define specific elements of permit program procedures in developing their State programs, proposed part 71 would decide these issues in the regulation itself, rather than rely upon further program development. Moreover, in proposed § 71.11, which is discussed in greater detail later in this preamble, EPA proposes detailed procedures for permitting actions, similar to those found at 40 CFR part 124 governing other EPA administered permit programs.

1. Permit Issuance and Renewal

Proposed part 71 follows part 70 in providing that no permit could be issued unless the permitting authority has received a complete application from the source and complied with the applicable public notice, affected State and EPA review requirements. These procedures are set forth in proposed § 71.7(a)-(c). The permitting authority would be required to promptly notify the applicant source as to whether the application is complete. Like in part 70, under proposed § 71.7(a)(3) unless the permitting authority requests further information from the source or notifies the source that the application is incomplete, the application would be automatically deemed complete by operation of law 60 days after the source submitted it. However, consistent

with the proposed revisions to part 70, the permitting authority would not be required to determine whether an application for an administrative permit amendment, de minimis permit revision or minor permit revision is complete before processing that application. These procedures for streamlined permit revisions are described in detail below; essentially, the expedited nature of these procedures would not allow time for completeness reviews, and EPA believes that the safeguards associated with applications for these procedures makes completeness review unnecessary.

Consistent with part 70, proposed § 71.7(a)(4) would require that the permitting authority provide a statement describing the legal and factual basis for draft permit terms, and make this statement publicly available. This statement would refer to the statutory or regulatory authorities for the draft permit terms and conditions, so that interested members of the public could review the draft permit for its adequacy in implementing the applicable requirements that apply to the source. If a part 71 program has been delegated to a State or Tribal agency for administration, this statement would be sent to EPA.

Proposed § 71.7(a)(6) would follow existing part 70 and its recent proposed revisions in requiring that any new applicable requirement that becomes applicable to a source prior to issuance of the draft permit would have to be included in the draft permit and finally issued permit. However, if the new applicable requirement becomes applicable after draft permit issuance, the permitting

authority could issue the final permit based on the draft permit, without including permit terms reflecting the new applicable requirement, provided that the permitting authority begins permit reopening procedures to incorporate the new applicable requirement by the date of permit issuance and provided that the permit as issued indicates that the permit is being reopened to incorporate the new applicable requirement. As discussed in the proposed revisions to part 70 preamble, EPA believes this provision is necessary to avoid delays in permit issuance when new applicable requirements are approved or promulgated. Except as provided under this provision, no permit would issue unless the terms and conditions of the permit assure compliance with all applicable requirements that apply to the source.

Like part 70, proposed § 71.7(a)(2) would require that the permitting authority take final action on applications for permit issuance and renewal within 18 months of receiving the complete application, except as provided under regulations implementing the acid rain provisions of title IV of the Act, as provided in the 3-year transition plan contained in proposed § 71.4(i), and as provided under regulations implementing the early reductions program of section 112(i)(5) of the Act that require final action to be taken within 12 months of application receipt. The EPA expects that part 71 programs would usually be administered for limited durations while States work toward obtaining part 70 program approval. Consequently, EPA expects that

the transition schedule of proposed § 71.4(i) would generally govern. In all cases, proposed § 71.7(a)(2) provides that final action may be delayed beyond the relevant deadline if an applicant source fails to timely respond to requests from the permitting authority for more information. The EPA believes this additional provision is necessary to ensure that the permitting authority is not forced to take action when an application is initially found complete, but it then becomes apparent that more information is needed before the permitting authority can take final action on the permit.

Consistent with the proposed revisions to part 70, under proposed § 71.7(b) no source could operate after the date on which it must submit a complete permit application except in compliance with an issued part 70 or part 71 permit. As under part 70, there would be exceptions to this general rule. First, where the source had applied for an administrative amendment, de minimis permit revision, or minor permit revision, the source's ability to operate inconsistently with its existing permit terms would be established according to the procedures governing those streamlined permit revisions. Second, if a source submits a timely and complete application for initial permit issuance or permit renewal, it could generally operate without risk of being found in violation of this provision until the permitting authority takes final action on the application. This exception to the general rule is commonly referred to as the "application shield." It is intended to protect

sources that have submitted complete applications in good faith, and would cease to apply if, after the permitting authority has found the application complete, the applicant source fails to timely submit any additional information that the permitting authority has requested in writing.

Where permits are being renewed under a part 71 program, under proposed § 71.7(c) permit renewals would be subject to the same procedures as initial permit issuance. While permit expiration would generally terminate a source's right to operate, if the source has submitted a timely and complete application for renewal it could continue to operate. Moreover, if the source has timely submitted a complete renewal application but the permitting authority does not take final action on the application before the existing permit is due to expire, all the terms and conditions of the existing permit, including any permit shield, would remain in effect until the permitting authority takes final action on the renewal application. This will avoid putting sources at risk of liability when the permitting authority is slow to act on a renewal application that the source had submitted in compliance with this part. However, in cases where EPA had delegated part 71 administration to a delegate State or Tribal agency, EPA would reserve its right under section 505(e) of the Act to terminate or revoke and reissue the permit. Such action may be necessary if it appears the delegate agency is not taking appropriate action to expeditiously process the permit application.

2. Permit Revisions

Proposed §§ 71.7(d)-(h) would govern how permits are revised under part 71 programs. These procedures would generally follow the 4-track system contained in the recently proposed revisions to part 70. However, certain aspects of the 4-track system would not be available unless EPA had delegated administration of a part 71 program to a State or eligible Tribal agency. Moreover, where the proposed revisions to part 70 had left it to State discretion to decide certain issues on a program-by-program basis, part 71 would contain specific provisions. Where the permit revision procedures under part 71 would differ from those under proposed part 70, the rationale for those differences is provided in detail. Where the procedures under part 71 would be the same as those under the proposed part 70 4-track system, this notice incorporates by reference the rationale for those provisions contained in the notice for the proposed revisions to part 70. See 59 FR 44460 (Aug. 29, 1994).

The EPA wishes to again stress at the outset that the only changes at a source that would require a permit revision would be those that cannot be operated without (1) violating a permit term or (2) rendering the source subject to a requirement to which the source had not been previously subject. As under part 70, the number of changes requiring permit revision could be minimized through the use of alternative scenarios and operational flexibility provisions, as well as "worst case" permitting (i.e.,

writing permits to reflect maximum allowable emissions). Moreover, even if a change would render the source subject to new applicable requirements, if the source could implement the change and continue to comply with its existing permit terms, it could delay bringing the new requirement into the permit by use of the proposed off-permit procedures previously discussed in this notice.

Briefly, part 71 would follow provisions in the current part 70 rule governing administrative amendments, as supplemented by the proposed revisions to part 70. These provisions would allow a source to implement an eligible change upon submission of a permit application for the administrative amendment, without requiring public or affected State notice. (In operating the change before its permit is revised, the source would accept the risk of being found liable for violating its existing permit if its revision application is subsequently denied.) Moreover, where EPA had delegated administration of a part 71 program to a State or eligible Tribe, the source could apply for merged processing of its preconstruction permit application and part 71 permit revision application. The source could then construct the change upon receiving preconstruction approval and could operate the change at its own risk 21 days after, or upon submission of, an administrative amendment application, depending on the nature of the change. The EPA would then have an opportunity to object to the change, beginning upon the submission of the administrative amendment application.

Part 71 would also follow the proposed revisions to part 70 by providing a de minimis permit revision track that allows a source to operate at its own risk any change at a small emissions unit or a small change at a large unit as early as the day it submits its de minimis permit revision application. To ensure the continuing enforceability of controls on large emissions units, a small change at a large unit would qualify for de minimis procedures only if no unauthorized changes to compliance monitoring terms are needed to implement the change. Public and affected State notice and opportunity to challenge the eligibility of the change for the fast-track process would be provided by the source after the change is made. Where EPA had delegated a part 71 program to a State or eligible Tribe, EPA would not review de minimis changes unless petitioned to do so.

The minor permit revision process contained in the proposed revisions to part 70 would also be followed in part 71. The scope of eligible changes would include changes that had undergone a preconstruction approval process that was not upgraded to part 71 standards. For eligible changes, public and affected State notice and a 21-day opportunity to challenge the eligibility of the change for the process would be provided before the applicant source could operate the change. Following the close of the comment period, the source could operate the change at its own risk if no commenter objected and the permitting authority did not act to disapprove the change. If a commenter did object, the source could operate the change

starting 1 week after the close of the comment period if the permitting authority did not disapprove the change. A public commenter whose objection is not heeded would have recourse to the courts, either to require the permitting authority to respond to the objection or to challenge the permitting authority's rejection of it. The permitting authority would be required to take final action on the revision application within 60 days of receiving it. Where EPA had delegated a part 71 program to a State or eligible Tribe, the source would be required to forward its application to EPA at the same time it submits it to the delegate agency, and an EPA objection would prevent the source from being able to implement the change; the delegate agency would not be required to take final action on the minor permit revision application until 15 days after the expiration of EPA's 45-day review period. Upon issuance of the minor permit revision, a permit shield would be authorized for the change.

Finally, following the proposed revisions to part 70, changes that conflicted with the gatekeepers for more streamlined permit revision tracks would have to be processed using significant permit revision procedures. For example, any change to a permit term that establishes an emissions limit or cap that was federally enforceable solely because it had been established through title V permitting

procedures[3] could not be made pursuant to the more streamlined tracks and would have to undergo significant permit revision processing. Any change that involved large or complex netting transactions that did not receive adequate prior public review would also be subject to the significant permit revision process.

As in the proposed revisions to part 70, EPA notes that it is considering a variation on the revision tracks just described that would provide for more flexible treatment of changes to compliance monitoring terms. At the end of the "Permit Revisions" section of this preamble, EPA delineates this alternative approach. The EPA believes the alternative approach better matches the significance of potential changes involving compliance monitoring terms with the amount of public process required. For example, under the proposed 4-track system, the de minimis permit revision process could be used to change any compliance monitoring term associated with a change at a small unit, but could not be used to change any compliance monitoring term associated with a de minimis change at a large unit unless the change had been previously approved in a process involving substantially more public, affected State, and, in the case

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[3]Permit actions that involve only title V processing, as opposed to actions undertaken pursuant to a preconstruction review process that has been upgraded to meet part 71 requirements, would include establishment of early reductions alternative emissions limitations under section 112(i)(5) of the Act, case-by-case MACT limits under section 112(j), and federally enforceable emissions caps created in a title V permit to limit a source's potential to emit in order to avoid otherwise applicable requirements.

of a program delegated by EPA to a State or eligible Tribe, EPA review. The alternative later described, however, would allow specified types of monitoring changes to be made pursuant to the de minimis track. The overall effect of the alternative would be to partially limit the types of de minimis changes that could be made at small units but significantly expand the types of de minimis changes that could be made at large units.

The EPA wishes to stress that in first describing this permit revision structure in the proposed revisions to part 70, the Agency solicited comments on ways to simplify what is admittedly a complex system. In responding to comments that are received on the part 70 proposal, EPA may finally promulgate a permit revision system that differs from that in the proposal. To the extent appropriate, EPA intends in part 71 to follow the part 70 permit revision structure as it is finally promulgated. Likewise, to the extent appropriate, the permit revision system proposed below for part 71 follows the system described in the proposed revisions to part 70.

a. Administrative Amendments.

(1) Scope. The provisions governing administrative amendments to part 71 permits would be located at proposed § 71.7(e). Today's proposal would follow existing part 70 in allowing changes that are generally clerical in nature to be made pursuant to administrative amendment procedures. These types of changes would include correction of typographical errors, changes in the name, phone number or

address of persons identified in the permit, and changes in ownership if no other change is necessary and certain conditions are met concerning transfer of ownership. Also, like the proposed revisions to part 70, part 71 would allow increases in the frequency of required testing, monitoring, recordkeeping and reporting to be incorporated through the administrative amendment process. While part 70 provides a subsequent opportunity for identifying other changes similar to those just described for processing as administrative amendments in the program approval stage, part 71 would not, simply because after promulgation of this rule there would be no further stage of part 71 program development. Part 71 would also follow part 70 in providing that for purposes of the acid rain portion of the permit, administrative amendments would be governed by regulations promulgated under title IV of the Act.

Where EPA has delegated administration of a part 71 program to a State or eligible Tribe, part 71 would follow the recent proposed revisions to part 70 by allowing changes that undergo "merged" part 71/NSR or part 71/section 112(g) process to be incorporated into the part 71 permit as administrative amendments. For purposes of part 71, this opportunity to follow proposed part 70 would exist only where States or eligible Tribes take delegation of the part 71 program. When administering a part 71 program for a State, EPA would not also be implementing the State's preconstruction program, so EPA would not be able to upgrade the State's preconstruction program to part 71 process.

While this eliminates a significant opportunity for streamlined permit revision where EPA is acting as the permitting authority, EPA believes that it is infeasible for EPA to merge preconstruction review and part 71 review unless the same permitting authority processes both actions. Moreover, to the extent States take delegation of part 71 programs, this opportunity for flexibility will be present. The EPA solicits comment on the proposed limited availability of merged processing under part 71, and suggestions for ways in which this merged processing could be more feasibly provided.

To be merged, a part 71/NSR or part 71/section 112(g) review process would have to address and comply with the permit application and content requirements of both part 71 and NSR or section 112(g) programs, and provide for certain minimum elements of public process. These elements are prior (i.e., preconstruction) notice to the public, affected States and EPA of the proposed NSR or section 112(g) action; a public comment period of at least 30 days for major NSR or section 112(g) actions and, for minor NSR changes, as many days as required by the delegate agency's existing SIP-approved minor NSR regulations as of November 15, 1993 (but not less than 15 days)[4]; and an opportunity for a public

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[4]However, for any minor NSR change that involved a netting transaction that included any single emissions increase that is greater than applicable significance levels or a sum of increases greater than applicable major source levels, a public comment period of at least 30 days would have to be provided. This qualification is needed to ensure consistency between the proposed procedures for administrative amendments and minor permit revisions that

hearing for major modifications under parts C or D of title I of the Act. The public comment period, and hearing if required, would occur prior to any delegate agency approval for the source to construct. However, EPA's opportunity to object to the change would not need to be provided prior to construction or modification of the source. Rather, EPA's veto opportunity could occur at the time the source applies for the administrative amendment. A delegate agency or source would remain free to provide for EPA's objection opportunity to occur prior to construction, if it preferred not to run the risk of EPA's objecting to the change after construction.

In delegation agreements, EPA and delegate agencies could agree that delegate agencies could conduct merged processing on a case-by-case basis. That is, delegate agencies could be authorized to provide merged process for all or some of their preconstruction determinations or to allow sources to elect merged process for only individual changes. Delegate agencies that provided merged process on only a case-specific basis would have to state when they are doing so in the initial notification of the permit action sent to EPA. A delegate agency that wished to provide for merged NSR changes would have to set out the eligibility criteria and process for merged NSR changes in its application for delegation to EPA. Depending on existing State statutory or regulatory provisions, no changes would

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are discussed later in this preamble.

be required to existing NSR programs. While under the proposed revisions to part 70 EPA would require States to submit eligibility criteria for merged processing in their part 70 programs that EPA would review in the context of program approval, EPA believes that the process for applying for delegation and entering into delegation agreements provides an adequate forum for evaluating a delegate agency's ability to provide merged processing. Similarly, EPA believes that delegation agreements are adequate vehicles for establishing a delegate agency's authority to merge preconstruction and part 71 actions on a case-by-case basis. The delegation process requires the State to submit evidence of adequate statutory and regulatory authority to carry out part 71 responsibilities, and EPA would publish delegation agreements in the Federal Register, giving notice of the delegate agency's authorization to provide for merged processing.

As in the proposed revisions to part 70, EPA wishes to clarify that a merged NSR program could be one that totally integrates the preconstruction and part 71 review requirements into a single permit system. A part 71 permit under such a system could be revised through an operating permit revision process that is integrated with the preconstruction review process resulting in a single permit containing both preconstruction and operating permit terms and conditions, rather than a merged NSR process followed by an administrative amendment process to incorporate the change into the separately existing part 71 permit. Such an